INDEX.

ABSENTEE.

1. An action may be maintained against an absentee, though not personally cited, and though no property of his have been attached, where a curator, *ad hoc*, has been appointed to represent him. *Copley* v. *Berry*, 79.
2. Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but, on the exception being overruled, pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court. *Grove* v. *Harvey—Re-hearing*, 226.
3. An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of every action, (C. P. 206.) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal. *Krœutler* v. *Bank of United States—Re-hearing*, 461.

See APPEAL, 7, 10. ATTACHMENT, 12. CURATOR AD HOC.

ACCESSION.

1. Where a jury, in ascertaining the amount to which a defendant is entitled for improvements made by him which have enhanced the value of the land recovered by plaintiff, charge the latter with the buildings erected on the land, at a high estimate, as necessarily enhancing the value of the soil, without affording him an opportunity of availing himself of the choice given by art. 500 of the Civil Code, the verdict will be set aside. *Kellam* v. *Rippey*, 44.
2. A possessor in bad faith cannot claim any thing for improvements made by him on the premises, where their value does not exceed that of the fruits and revenues received by him. Such a possessor has no claim to the fruits and revenues. C. C. 3416. *Williams* v. *Booker—Re-hearing*, 256.

See HUSBAND AND WIFE, 13.

ADMINISTRATOR.

See SUCCESSIONS, IV.

AGENCY.

1. Where one styling himself the agent of another takes the oath and signs the bond necessary to obtain an attachment, without sufficient authority from his principal, the attachment must be dissolved, though the acts of the pretended agent be subsequently ratified by the principal. The authority of the agent must exist at the time of the attachment. C. P. 245.

Grove v. *Harvey*, 221.

2. A power to sign an attachment bond must be special. C. C. 2966. *Ib.*

3. Where a creditor receives from his debtor a draft on a third person, as collateral security, the proceeds to be applied to the payment of his debt, he acts, so long as he holds the draft, as the agent of his debtor, and is responsible not only for unfaithfulness, but for faults or neglect; (C. C. 2971, 2972:) and where, through the neglect of the creditor, in giving incorrect instructions to the notary by whom the draft was protested, or in not furnishing him with the means of obtaining correct information as to the residence of the endorser, the latter, the only solvent party to the bill, is discharged, the debtor will be entitled to credit for the amount of the bill.

Cammack v. *Priestly*, 423.

4. In questions as to the individual liability of persons acting avowedly as agents, the principal inquiry must be to whom was the credit given according to the understanding of both parties; and this is to be ascertained by an examination of the contract itself, the circumstances under which it was made, and the manner in which it had been executed and appears to have been understood, by the parties. *Campbell* v. *Nicholson*, 428.

5. In an action on a bill accepted by an agent, the evidence of witnesses who testify that they had seen the written authority by which defendants empowered the agent to accept bills for them, will be admissible, where the power itself is not in plaintiff's possession, nor under his control.

Kræutler v. *Bank of United States*, 456.

6. An authority to sell real property and to apply the proceeds in a particular way, unexecuted at the time of a *cessio bonorum* by the principal, is revoked thereby. *Barrett* v. *His Creditors*, 474.

7. To entitle a plaintiff to recover on a contract executed by a person acting as an agent, the authority of the agent must be proved.

Carpenter v. *Beatty*, 540.

8. A mandate, in general terms, confers only a power of administration. To alienate property, or to exercise any other act of ownership, it must be express and special. C. C. 2965, 2966. *Smith* v. *McMicken*, 653.

9. A transfer of a judgment belonging to a partnership in a state of liquidation, made by an agent authorized to settle its affairs, but not expressly empowered to sell or transfer such property, must be declared void, unless it be shown that the transfer, being for the settlement, or payment of a part-

nership debt, was for the benefit of the partnership, and necessary to its liquidation, and that due notice thereof was given to the judgment-debtor. *Ib.*

10. Where an agent has acted without authority, a subsequent ratification by the principal will not render the act valid from its date as to third persons. *Ib.*

11. Plaintiff having commenced an action against a city corporation for damages for oppressive and illegal proceedings on the part of the President and Council, in which she alleged that the latter, though acting officially, were really actuated by private interest and malice, obtained an injunction restraining them from entering upon and committing any trespass on her property. Defendants disregarded the injunction, and demolished a portion of a building forming part of the property. The jury returned a verdict in favor of plaintiff for an amount greatly exceeding the actual damage to the property, and there was judgment accordingly. On appeal: *Held*, that the acts of the President and Council having been alleged to be wilful and malicious, plaintiff cannot recover vindictive damages against the corporation, but only an indemnity for the loss actually sustained by her.

McGary v. *City of Lafayette—Re-hearing*, 674.

ALIMONY.

Defendant, the natural tutor of his minor children, having rendered an account of his administration of the estate of his deceased wife, with whom there existed a community of *acquests*, charged himself with the revenues of the minors derived from property inherited from their mother and administered by him as tutor, but omitted to credit himself with the expenditures incurred subsequently to the dissolution of the community for their maintenance and education. It was proved, that the community and the surviving husband were insolvent, and that the latter had no property at the death of the wife. The property of the minors was sufficient to provide for their support and education. On an opposition by plaintiffs, who had obtained a judgment against defendant, their former tutor, for a balance due to them: *Held*, that defendant, as natural tutor of his children, was bound to account for the revenues of their property, after deducting the expenses of their support and education, according to their means and condition in life; that the alimony due from ascendants to descendants being due only in proportion to the wants of the one and the circumstances of the other, none was due by defendant to his children, (C. C. 245, 246, 247;) and that the children having an income sufficient for their support and education, plaintiffs, who were interested in the settlement of the tutorship, had a right to require that the support and education of the minors should be paid for out of the revenues of their property. *Mercier* v. *Canonge*, 385.

AMENDMENT.

See PLEADING, 10, 11.

ANSWER.

See PLEADING, 20.

APPEAL.

I. *From what Judgments an Appeal will lie.*
II. *Petition of Appeal.*
III. *When Appeal may be taken.*
IV. *Parties to Appeal.*
V. *Appeal Bond, and Order fixing its Amount.*
VI. *Effect of Appeal in Suspending Execution.*
VII. *Record of Appeal.*
VIII. *Assignment of Error, and Matters urged for the first time after Appeal.*
IX. *Judgment on Appeal.*

I. *From what Judgments an Appeal will lie.*

1. The amount claimed, and not that allowed by the judgment of the court of the first instance, determines the right to appeal.

Succession of Stafford, 178.

2. An appeal may be claimed as a matter of right, from a judgment homologating a final and notarial act of partition of property, formerly held in community between the applicant and his deceased wife, where the amount is sufficient to give jurisdiction to the Supreme Court. It is no ground for refusing the appeal to allege, that the act of partition has been made in conformity to previous decrees of the Supreme Court, between the same parties, having the force of *res judicata*, and that it is but the carrying into execution of such previous decrees. C. P. 565. *Per Curiam:* Whether anything has been done by the notary, or by the judge in homologating the report, in violation of the legal rights of the parties as settled by previous decrees, are questions which can only be examined on the appeal of the party who thinks that he has been aggrieved.

State v. *Judge of Probates of West Baton Rouge*, 315.

3. The syndics of an insolvent having presented a *tableau* of distribution, certain items for syndics' commissions and sums paid to the attorney of absent heirs and for clerk hire, were rejected, either wholly or in part. One of the syndics prayed for a suspensive appeal, which was refused on the ground that his separate interest was not sufficient to entitle him to an appeal. On a rule to show cause why a *mandamus* should not be issued, the judge, *a quo*, showed that since the appeal was refused to the first applicant, a petition for an appeal from the same judgment had been presented by the two syndics and allowed generally. *Held*, that two appeals cannot be allowed to the same person from the same judgment, and that the rule must be discharged. *State* v. *Judge of District Court of First District*, 320.

4. An ap peal will lie in favor of the heirs from a judgment on an opposition made

by them to a *tableau* of distribution presented by the curator of the succession of the deceased, though none of the claims so opposed and allowed against the estate exceed three hundred dollars, where their whole amount exceeds that sum. *State* v. *Judge of Probates of New Orleans*, 415.

5. No appeal will lie from a judgment dissolving an injunction obtained to restrain the levying of a tax, where the opposite party is required, as the condition of its dissolution, to give security for the reimbursement of any sum which may be paid by plaintiffs, in case there should be a judgment in their favor. The judgment is interlocutory, and does not work irreparable injury. *State* v. *First Municipality of New Orleans*, 488.

II. *Petition of Appeal.*

6. Where the petition for an appeal, drawn up in the names both of the defendant and a garnishee, was not signed by the counsel of the former, through inadvertence, but the bond, executed in pursuance of the order of the judge allowing the appeal, was executed in the name of both appellants, though not signed by the defendant, it is sufficient. The omission of the attorney to sign the petition is not such a fault of the appellant as will justify the dismissal of the appeal. The omission may be supplied under section 19 of the act of 20th March, 1839. *Erwin* v. *Commercial and Railroad Bank*, 227.

7. Where the atorney appointed to represent absent defendants applies, as such attorney, for an appeal from a judgment against them, alleging in his petition that there is error to their prejudice in the judgment, and praying, on their behalf, for the appeal, and the appeal is allowed to them by the order of the judge, the appeal must be considered as taken by the defendants. *Kræutler* v. *Bank of United States*, 456.

III. *When Appeal may be taken.*

8. A suspensive appeal may be taken within ten days from the day on which judgment was signed, exclusive of Sundays and days of public rest; and in computing the time, neither the day on which the judgment, was signed, nor that on which the appeal is to be taken, is included. C. P. 318. *Garland* v. *Holmes*, 421.

9. Where the last day allowed for obtaining an appeal falls on a day of public rest, the whole of the next judicial day is allowed. *Ib.*

10. One who resides out of the State may appeal from a judgment rendered against him at any time within two years from the day on which final judgment was rendered (C. P. 593); and where plaintiffs allege in their petition and affidavit for an attachment that defendants are non-residents, it is sufficient evidence of such non-residence. *Kræutler* v. *Bank of United States*, 456.

IV. *Parties to Appeal.*

11. Where the plaintiff in a petitory action, appeals from a judgment rendered in favor of the defendant, third persons called in warranty, must be cited as

appellees, or the appeal will be dismissed. *Per Curiam:* One who asks relief at our hands, must bring before us all the parties interested in maintaining the judgment which he seeks to have amended or reversed.

Oliver v. *Williams*, 180.

12. All the parties interested that a judgment shall remain undisturbed, must be made parties to any appeal taken from it, and their names must be included in the appeal bond, or the appeal will be dismissed; and this rule applies to the intervening parties interested in the judgment.

Swearingen v. *McDaniel*, 203.

13. In a suit for freedom instituted against the curator of a succession and the tutrix of the heirs, judgment was rendered in favor of the plaintiff, and the tutrix alone appealed, without making the curator a party: *Held*, that the demand of the petition was indivisible, and the judgment a joint one; that it cannot stand as to the curator and be reversed as to the heirs; that no appeal having been taken by the curator within the time prescribed by law, the judgment had become final as to the succession; that the heirs, being minors, could accept the succession only with the benefit of inventory, and, as beneficiary heirs, were entitled only to the residue of the estate after the payment of the debts, (C. C. 1051); that this residuary interest gave them no authority to represent the succession. and that their separate appeal could not prevent the judgment from becoming final against the estate; and that as the succession, in consequence of the judgment having become final, is concluded thereby, the appellants are also concluded. Appeal dismissed.

Andat v. *Gilly*, 323.

14. Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age. *Mitchell* v. *Cooley*, 370.

V. *Appeal Bond, and Order fixing its Amount.*

15. Where the judge, in granting an appeal, whether suspensive or devolutive, omits to state at the foot of the petition praying for it, the amount of the security to be given by the appellant, the appeal must be dismissed. C. P. 574, 575, 578. *State* v. *Commercial and Railroad Bank*, 187.

See 12 *Supra.*

VI. *Effect of Appeal in Suspending Execution.*

16. Where a *fi. fa.* has been issued against a defendant before notice of judgment served on him as required by law, he may require that the *fi. fa.* be quashed, and a suspensive appeal allowed. But where he contents himself with taking a devolutive appeal only, he cannot afterwards complain.

Hatch v. *English*, 135.

VII. *Record of Appeal.*

17. Where the amount in controversy cannot be ascertained from the record, the appeal must be dismissed. *Succession of Tompkins*, 110.

18. Where testimony taken on the trial below was not reduced to writing, and there is no statement of facts nor assignment of error, the appeal must be dismissed. *Barbour* v. *Smith*, 421.

VIII. *Assignment of Error, and matters urged for the first time after Appeal.*

19. Where an appellant urges as a ground for reversing a judgment, that the attorney by whom the case was conducted on his behalf in the court below had no authority to represent him, the allegation must be supported by affidavit, or it will not be noticed. *Fisher* v. *Moore*, 95.

20. In an assignment of errors, the error must be plainly and fully stated; and nothing can be assigned as error which depends on the facts of the case, or which might have been cured by legal evidence on the trial.
Kraeutler v. *Bank of United States*, 456.

21. Where the record contains all the evidence introduced on the trial, or a statement of facts on which the appellant relies either wholly or in part, the appeal cannot be dismissed for want of a formal assignment of errors. C. P. 897. *Ibid—Re-hearing*, 461.

22. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal. *Ibid.*

23. The exception of *res judicata* can be pleaded for the first time before the Supreme Court, only where the facts necessary to sustain it appear from the record. C. P. 903. *Carpenter* v. *Beatty*, 540.

IX. *Judgment on Appeal.*

24. Damages will not be allowed for a frivolous appeal, unless prayed for by the appellee. *Benton* v. *Roberts*, 112. *Johnson* v. *Bailey*, 177.

25. Where the evidence is contradictory, and its effect depends in a great degree upon the credibility of the witnesses, a jury are the best judges of the weight to which it is entitled; and their verdict will not be disturbed, unless manifestly wrong. *Edwards* v. *Burroughs*, 171.

26. The verdict of a jury must be set aside when evidently wrong.
Marigny v. *Union Bank of Louisiana*, 283.

ARREST.

Damages for an illegal arrest, may be recovered under art. 2994 of the Civil Code, which declares that every man shall be bound to repair any damage done by his fault to another. *Spofford* v. *Pemberton*, 162.

ASSIGNMENT.

Where a a creditor accepts from the assignee of the bank a certificate, recognizing him as a creditor for the amount of the certificate, and declaring him or his assigns entitled to the benefit of the assignment, and to a *pro rata* proportion of any dividends which may be declared, his transferree cannot dispute the validity of the assignment. *Per Curiam:* By surrendering to the assignees the original evidence of his claim, and accepting the certficate, the creditor acceded to the conditions of the assignment itself.

Lowry v. *Commercial and Railroad Bank*, 193.

ATTACHMENT.

1. On a motion to dissolve an attachment for insufficiency of the affidavit, the judge not having signed the certificate that the affidavit had been made before him, it appeared that the words, "Sworn and subscribed before me," were written across the affidavit in the hand-writing of the judge, but that they were not signed by him; that the order allowing the attachment recited that the judge had read the petition, affidavit, &c., and was written immediately before these words, on the same paper, and was signed by the judge; and that the unfinished certificate as to the oath and the order, bore the same date. *Held*, that the attachment should be maintained; that the judge acted on the affidavit as one sworn to before him; and in signing the order containing that expression, by the strongest implication, certified that it had been sworn to before him. *English* v. *Wall*, 132.

2. Where one styling himself the agent of another takes the oath and signs the bond necessary to obtain an attachment, without sufficient authority from his principal, the attachment must be dissolved, though the acts of the pretended agent be subsequently ratified by the principal. The authority of the agent must exist at the time of the attachment. C. P. 245.

Grove v. *Harvey*, 221.

3. A power to sign an attachment bond must be special, C. C. 2966. *Ib.*

4. Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but on the exception being overruled, pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court.

Ib.—Re-hearing, 226.

5. In attachment cases all the forms must be strictly complied with, or the proceedings will be void.

Erwin v. *Commercial and Railroad Bank*, 227.

6. Plaintiff who had obtained an attachment on giving a bond as required by law represented that the attachment had not been served or levied according to law, and was therefore void, and prayed that another attachment might be issued, which was done, but no new bond was executed. The bond referred only to the first attachment. *Held*, that the liability of the surety in the bond related exclusively to the first attachment and bound him only for

any damage resulting from it; that the bond could not be revived without his consent; and that the second attachment must be dismissed. *Ib.*

7. An attachment bond must be for a sum exceeding by one-half the whole amount claimed, inclusive of the interest which had accrued up to the date of filing the petition. C. P. 245. *Ib.*

8. Where the proceeds of property sold by a factor had been transferred to a third person for a valuable consideration, and notice of the transfer given to the factor before the issuing of an attachment at the suit of a creditor of the original owner, the attachment must be set aside. It matters not how the factor was informed of the transfer, provided it be shown that he knew that his creditor was divested of all right to the debt so transferred, and that such knowledge was derived from the transferree or his agent.

Bank of St. Mary v. *Morton*, 409.

9. Where the original owner has lost all power over the property, and the title has legally vested in another, the creditors of the former cannot attach. *Ib.*

10. Garnishees in cases of attachment, and third persons to whom interrogatories are authorized to be propounded by the 13th section of the statute of 20th March, 1839, are parties to the controversy at least as between the plaintiff and themselves, and may be required to answer, in open court, any interrogatories propounded to them. *Petway* v. *Goodin*, 445.

11. An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of every action, (C. P. 206,) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal.

Kraeutler v. *Bank of United States.—Re-hearing*, 461.

12. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal. *Ib.*

13. A return by a marshal on an attachment, "that he had executed the writ by seizing in the hands of A. all sums of money, rights, credits, and property belonging to the defendant, to an amount sufficient to satisfy the debt," &c., is alone no evidence that any thing was actually seized.

Poole v. *Brooks*, 484.

ATTORNEY AT LAW.

1. Where an appellant urges as a ground for reversing a judgment, that the attorney by whom the case was conducted on his behalf in the court below had no authority to represent him, the allegation must be supported by affidavit, or it will not be noticed. *Fisher* v. *Moore*, 95.

2. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.

Turner v. *Walsh*, 383.

3. In determining the compensation to be allowed to an attorney appointed to represent the absent heirs of a succession, the court should not be governed by the opinion of other members of the profession as to the amount. It should exercise its own judgment, and the allowance should be made with reference to the labor, skill, and care required, and to the value of the estate. *Succession of Mager*, 413.

4. An attorney appointed to represent the absent heirs of a succession, is incompetent to act as attorney in procuring the recognition of the heir. Such recognition must be sought contradictorily with him. *Ib.*

5. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal.

Kraeutler v. *Bank of United States.—Re-hearing*, 461.

6. Defendants having retained plaintiff as their counsel, to defend them in certain actions, in which they had been cited as warrantors, executed a note in his favor for a sum stipulated as his fee. To an action on the note defendants pleaded that plaintiff never rendered the services, for the compensation of which the note was given. There was no evidence of any services rendered; but it was proved that the parties, who had cited the defendants as warrantors, had effected a compromise, by which the latter were discharged: *Held*, that plaintiff was entitled to recover, and that his inaction might have been the result of a conviction, that it would lead to a compromise, more advantageous to his clients, than any judgment he could hope to obtain. *Hennen* v. *Bourgeat*, 522.

AUDITOR OF ACCOUNTS.

1. Where accounts have been referred to auditors, the court may, on a motion to homologate the report, receive testimony and examine the auditors themselves, and correct any errors in the report, or order a new one, or a new examination of the accounts (C. P. 457); but it must proceed summarily. It cannot, without pronouncing on the report, submit the case to a jury. C. P. 457. *Flower* v. *Downs*, 101.

2. Where a party has moved for the homologation of the report of auditors after being amended in certain particulars, he will be thereby precluded from requiring any other amendments. *St. Romain* v. *Robeson*, 194.

BANK.

1. The seventh section of the statute of Mississippi, of 21 February, 1840, prohibiting the banks of that State from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, and the second section of the statute of 22 February, 1840, requiring that they shall at all times receive their own notes at par in payment of any debts due them by bill or otherwise, are constitutional, and do not impair the obligation of any contract; and where a judgment obtained by a Mississippi bank has been seized by a creditor of the bank, the debtor is still entitled to discharge it in notes of the bank, at par. *Williams* v. *Planters' Bank*, 125.

2. Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient. *Commercial Bank of Natchez* v. *Guice*, 181.

3. The statute of Mississippi of 21 February, 1840, which prohibits (s. 7) the banks of that State from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, renders any general assignment by a bank, so far as such *choses in action* are concerned, illegal. *Per Curiam:* The remedy would not have been co-extensive with the evil, if, while the assignment of a particular *chose in action* was forbidden, a bank should make a general assignment of all such property possessed by it.

Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

4. The illegality of an assignment made by a bank in the State of Mississippi, in violation of the seventh section of the statute of 21 February, 1840, prohibiting the transfer of any note, bill, or other evidence of debt, may be set up by a creditor of the bank who has attached its property, where the assignment is pleaded as a means of defeating the attachment. The provision of that section, that any action on a bill, note, or other evidence of debt, so transferred, shall abate on the plea of the defendant, does not restrict to a debtor of the bank the right to plead the illegality of such a transfer. *Ib.*

5. Commissioners appointed under the act of 14 March, 1842, ch. 98, to liquidate a bank, may maintain an action against the late officers and directors for damages for maladministration of its affairs. Sects. 12, 24. *Per Curiam:* Any action against bank directors for maladministration may be maintained by their successors; and any action which the directors might have maintained, while the corporation was in existence, to increase the fund out of which the debts of the body corporate are to be paid, may be instituted by the commissioners after its dissolution.

French v. *Landis*, 633.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Transfer.*

II. *Accommodation Endorsers.*

III. *Presentment for Payment and Protest.*

IV. *Promise to Pay after Discharge.*
V. *Promise to Pay by Third Persons.*
VI. *Evidence in Actions on Bills and Notes.*
VII. *Prescription and other Defences to Actions on Bills and Notes.*

I. *Transfer.*

1. Parol proof that a promissory note payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523. *Morres* v. *Compton*, 76.

See 21 *infra*.

II. *Accommodation Endorsers.*

2. An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the holder, their liability depends on the rules applicable to negotiable instruments in general. *Jacobs* v. *Williams*, 183.

III. *Presentment for Payment and Protest.*

3. Notice, orally delivered, to an endorser of a note on the day of its maturity, but after business hours, that the note would be protested on that day unless it were paid, or some arrangement made, is insufficient to bind the endorser. An endorser can only be made liable where the note has been duly protested for non-payment, after demand and presentation at the place where it was made payable, and written notice of the non-payment and protest. *Union Bank* v. *Fonteneau*, 120.

4. Notice of the non-payment and protest of a note, given to an endorser residing in the town in which the note was payable, two days after the protest, is insufficient. *Ib.*

5. The holder of a bill protested for non-payment, is not bound to send a notice directly to all the parties to it. If such notice be sent, it will enure to the benefit of any endorser who may pay the bill, in an action against previous endorsers, or the drawer. It is sufficient for the holder to give notice to his immediate endorser, leaving it to the latter to notify the next endorser, and so on to the drawer; one day being allowed to each party to notify his immediate endorser, or the drawer. The rule is the same where a note or bill is sent by the holder to his agent for collection. If the latter give timely notice of dishonor to his principal, it is sufficient; and a notice from the principal, seasonably sent, will suffice to charge any prior party. The

agent's knowledge of the endorser's residence, does not make it necessary for him to send a notice directly to the endorser.

Grand Gulf Railroad and Banking Company v. *Barnes*, 127.

6. A notice of protest sent to an endorser at the post office at which he usually received his letters and papers at the time of the protest, and which was in the parish in which he resided, is sufficient; though it be proved that there was another office in an adjoining parish nearer to his residence, at which the endorser, at a previous period, had been in the habit of receiving his letters and papers, there being no evidence to show that he continued to receive any letters or papers there at the date of the protest. *Ib.*

7. The drawer of a bill, on the face of which there was a waiver of acceptance, is not entitled to notice of its dishonor, and will not be discharged by its omission, where he had no funds in the hands of the drawee, but was to place the latter in funds to pay the bill at maturity, and it was not expected that the drawee, would pay without such deposit; but the bill must be presented for payment on the last day of grace, or he will be released.

English v. *Wall*, 132.

8. Notice of protest sent to an endorser by mail, must be addressed to him at his residence, and be directed to the post-office from which he is in the habit of receiving letters and papers, where that is the nearest to his residence.

Bell v. *Lawson*, 152.

9. Where an endorser receives his letters and papers from two post-offices, a notice of protest directed to either, will be sufficient.

New Orleans Canal and Banking Company v. *Briggs*, 175.

10. Notice to the drawer of the protest of a bill for non-payment, directed to him at a post-office not the nearest to his residence, without any proof that he was in the habit of receiving his letters and papers there, is insufficient.

New Orleans Savings Bank v. *Harper*, 231.

11. The drawer is not entitled to notice of non-payment by the acceptor, where the bill was accepted merely for the accommodation of the former. *Ib.*

IV. *Promise to pay after Discharge.*

12. A promise by the drawer to pay a bill, from which he has been released by illegalities in the notice of protest, will not be binding, unless it be proved that he was aware of his discharge at the time of the promise.

New Orleans Savings Bank v. *Harper*, 231.

V. *Promise to Pay by Third Persons.*

13. Where a person writes to his agent that "B. holds a note of F.'s endorsed by N.," and directs him to pay the note without interest, it amounts to a promise to pay the note; and if the holder accept the promise, it will be obligatory on the person by whom it was made. C. C. 1896.

Bell v. *Lawson*, 152.

14. A promise by a third person to pay a bill or note for the endorser, to be binding on the former, must be made with full knowledge by him of any want of due diligence on the part of the holder which may have exonerated

the endorser; but direct proof of such knowledge is not necessary. It may be inferred from the promise under the attending circumstances, as where the promise was to pay the principal due, without interest. In such a case it will be inferred that the circumstances discharging the endorser, were known; for, if the protest were regular, interest would run from its date. *Ib.*

VI. *Evidence in Actions on Bills and Notes.*

15. The certificate of the notary by whom a note was protested that demand of payment was made at the proper place, is *prima facie* evidence against the endorser, and sufficient, *per se*, until rebutted by direct proof.

Union Bank v. *Cushman*, 237.

16. The certificate of a notary that he presented a note, which was payable at the office of a parish judge, at the said office, to a person in the office, and demanded payment thereof, and was informed that there were no funds to pay it, is sufficient evidence of demand against the drawer of the note.

Dosson v. *Sanders*, 238.

17. Action by the holder against the maker of a note, endorsed by the payee in blank, and on which the latter had written an acknowledgment of the receipt of its value from the plaintiff, and at the same time warranted its payment to the plaintiff, or his assigns: *Held*, that judgment by default could not be confirmed against the defendants, without proof of the endorsement of the payee, and of his signature to the transfer written on the note. Proof of a plaintiff's demand is required in all cases when not admitted by the defendants. C. P. 312, 360. *Young* v. *Talbot*, 518.

VII. *Prescription and other Defences to Actions on Bills and Notes.*

18. Action against defendant personally for the amount of a promissory note, signed by him as executor, and endorsed by two other persons. It was proved that the note was given in part renewal of one made by defendant's testator, endorsed by the same persons, and which had been discounted for the deceased by plaintiffs; that the original note of the deceased was for a larger amount, which had been reduced in his lifetime by curtailments; and that, after his death, the debt was diminished by further curtailments, and the execution of new notes, signed by the defendant, as executor of the estate of deceased, or simply as executor, until reduced to the amount for which the note sued on was executed. *Held*, that the defendant is not liable personally; that the facts show that it was not originally contemplated by any of the parties that he should be so responsible; that the execution of the note sued on created no liability on the part of the estate of the deceased, nor even changed the nature of the original obligation, but was a mere acknowledgment of a debt which the executor was competent to make. *Bank of Louisiana* v. *Déjean*, 16.

19. The prescription of five years, established by art. 3505 of the Civil Code, does not apply to a promissory note not transferable by endorsement or delivery. Such a note is prescribed by ten years. C. C. 3508.

Whiting v. *Prentice*, 141. *Owen* v. *Holmes*, 148.

20. An acknowledgment of the debt by the maker of a note does not interrupt prescription as to the endorser. They are not debtors *in solido* in the meaning of arts. 2092, 3517 of the Civil Code, which declare that a suit brought against one of the debtors *in solido*, or his acknowledgment of the debt, interrupts prescription as to the rest. *Per Curiam:* The maker and endorser do not bind themselves at the same time, or by the same contract, but by different and successive contracts, without any privity or reciprocity. Debtors *in solido* are, among themselves, liable each only for his portion (C. C. 2099); if one pays the whole debt, he can claim from each of the rest only his portion; and if one be insolvent, his portion must be divided among the solvent obligors. C. C. 2100. *Aliter*, as to the maker and endorsers of a note or bill; each endorsement is a distinct contract; if payment be made by the maker, or first endorser, neither can claim anything from subsequent endorsers; while, if it be the last endorser who pays, he may claim the whole amount from any previous endorser or the maker; and each endorser has the same right against every previous endorser and the maker.
Jacobs v. *Williams*, 183.

21. The holder of a negotiable note given for the price of property fraudulently sold by a debtor after obtaining a respite, cannot recover on it, though taken before maturity, where the evidence shows that he was aware of the fraudulent character of the sale. *Pralon* v. *Aymard*, 486.

22. The fact, that some of the makers of a promissory note, who bound themselves jointly and severally, were unauthorized to contract, does not discharge the rest. *Per Curiam:* A co-debtor, *in solido*, cannot plead any exception merely personal to the other co-debtors. C. C. 2094.
Hennen v. *Bourgeat*, 522.

See 2 *supra*.

CITATION.

1. Rule on defendant to show cause why an execution should not be issued against her individually for a debt due by the succession of which she was curatrix. Defendant failed to appear. The rule was made absolute, and she appealed. The citation to answer the rule was served on a person stated in the return to be the attorney in fact of the curatrix. There was no allegation in the rule that the defendant was absent from the State; and the power only authorized the attorney to represent her in her capacity of curatrix. *Held*, that the rule must be discharged, for assuming that defendant was absent at the time of serving the citation, the power only authorized the attorney to represent her as curatrix, and the object of the rule was to render her personally liable. *Wilson* v. *Vincent*, 235.

2. An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of

every action, (C. P. 206,) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal.

Kraeutler v. *Bank of United States.—Re-hearing*, 461.

3. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal. *Ib.*

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Code of* 1808.
II. *Civil Code.*
III. *Code of Practice.*

I. *Code of* 1808.

Book I. tit. 7, art. 25. Illegitimate children. *Balot y Ripoll* v. *Morina*, 552.
—— II. — 2, — 1. Ownership. *Lafon* v. *De Armas*, 598.
—— III. — 1, — 118. Successions. *Calvit* v. *Mulhollan*, 258.
———— 2, — 17. Donations. *Compton* v. *Prescott*, 56.
———— 92. Donation *mortis causa*. *Keller* v. *McCalop*, 639.
———— 6, — 1, 4, 20, 24, 26, 36, 82, 86. Sale. *Lafon* v. *De Armas*, 598.
———— 20, — 62. Prescription. *Calvit* v. *Mulhollan*, 258.

II. *Civil Code.*

95. Marriage. *Compton* v. *Prescott*, 56.
200, 201, 202. Illegitimate children. *Compton* v. *Prescott*, 56.
221. Illegitimate children. *Ib.* *Balot y Ripoll* v. *Morina*, 552.
222, 226. ———— *Compton* v. *Prescott*, 56.
234. Parent and child. *Cleaveland* v. *Sprowl*, 172.
239, 240. ———— *Ib.* *Mercier* v. *Canonge*, 385.
243. ———— *Mercier* v. *Canonge*, 385.
245, 246, 247. Alimony. *Ib.*
259, 262. ———— *Compton* v. *Prescott*, 56.
265. Minor. *Mitchell* v. *Cooley*, 636.
267. —— *Cleaveland* v. *Sprowl*, 172. *Mercier* v. *Canonge*, 385.
268. —— *Ib.* 172, 385. *Mitchell* v. *Cooley*, 636.
333, 343. Minor. *Mercier* v. *Canonge*, 385.
345, 346. —— *Calvit* v. *Mulhollan*, 258.
354. —— *Cleaveland* v. *Sprowl*, 172.
437. Unincorporated associations. *Campbell* v. *Nicholson*, 428.
462, 466. Moveables and immoveables. *Succession of Packwood*, 334.
477. Successions. *Succession of Mager*, 584.

480. Ownership. *Barrett* v. *His Creditors*, 474. *Lafon* v. *De Armas*, 598.
482, 483, 484. Ownership. *Lafon* v. *De Armas*, 598.
500. Accession. *Kellam* v. *Rippey*, 44.
551, 552, 553, 555. Usufruct. *Cleaveland* v. *Sprowl*, 172.
867, 868, 869, 870. Successions. *Mayo* v. *Stroud*, 105.
882, 911, 923. ——— *Succession of Mager*, 584.
934 to 940. ——— *Calvit* v. *Mulhollan*, 258.
945, 946. ——— *Succession of Mager*, 584.
981. ——— *Buard* v. *Lémée*, 243.
1029. ——— *Calvit* v. *Mulhollan*, 258.
1031 to 1040. ——— *Arthur* v. *Cochran*, 41.
1041. ——— *Ib. Succession of Blakey*, 155.
1042 to 1050. ——— *Arthur* v. *Cochran*, 41.
1051. ——— *Ib. Buard* v. *Lémée*, 243. *Andat* v. *Gilly*, 323.
1052 to 1055. ——— *Arthur* v. *Cochran*, 41.
1056. ——— *Ib. Buard* v. *Lémée*, 243.
1057 to 1060. ——— *Arthur* v. *Cochran*, 41.
1062. Successions. *Succession of Blakey*, 155.
1088. ——— *Calvit* v. *Mulhollan*, 258.
1098. ——— *Succession of Blakey*, 155.
1119, 1120. Successions. *Dosson* v. *Sanders*, 238.
1160 to 1164. ——— *Tucker* v. *Beatty*, 545.
1167. Successions. *Succession of Dubreuil.—Re-hearing*, 511.
1168. ——— *Miller* v. *Miller*, 88. *Succession of Dubreuil.—Re-hearing*, 511.
1169, 1172, 1173. Successions. *Miller* v. *Miller*, 88.
1176, 1197. Successions. *Succession of Dubreuil*, 507.
1265. Successions. *Marionneaux* v. *Marionneaux*, 666.
1290, 1296 to 1299. Successions. *State* v. *Judge of Probates of West Baton Rouge*, 315.
1306, 1307. Successions. *Webb* v. *Goodby*, 539.
1342, 1343. Collation. *Succession of Pigneguy*, 450.
1434. Successions. *Ib.*
1468. ——— *Compton* v. *Prescott*, 56.
1473, 1474. Successions. *Ib. Balot y Ripoll* v. *Morina*, 552.
1477. Successions. *Succession of Mager*, 584.
1478. ——— *Compton* v. *Prescott*, 56.
1480. ——— *Webb* v. *Goodby*, 539.
1481. ——— *Compton* v. *Prescott*, 56.
1489. ——— *Balot y Ripoll* v. *Morina*, 552.
1507. *Fidei-Commissa. Compton* v. *Prescott*, 56.
1523, 1526. Donations *inter vivos. Morres* v. *Compton*, 76.
1571. Donations *mortis causa. Succession of Sparks*, 35. *Keller* v. *McCalop*, 639.
1578. ——— *Keller* v. *McCalop*, 639.

1583. Donations *mortis causa*. *Succession of Sparks*, 35.
1585, 1585. ——— *Keller* v. *McCalop*, 639.
1588. ——— *Succession of Sparks*, 35.
1599, 1602, 1603, 1604, 1697, 1702. Donations *mortis causa*. *Compton* v. *Prescott*, 56.
1739. Donations between Husband and Wife. *Ibid.*
1784. Contracts. *Cuny* v. *Brown*, 82.
1789. ——— *Grove* v. *Harvey*, 221.
1842. ——— *Marigny* v. *Union Bank*, 283.
1844, 1845, 1853. Contracts. *Gas Light and Banking Company* v. *Paulding*, 378.
1887. Contracts. *Marigny* v. *Union Bank*, 283. *Gas Light and Banking Company* v. *Paulding*, 378.
1889, 1890. Contracts. *Marigny* v. *Union Bank*, 283.
1896. Contracts. *Bell* v. *Lawson*, 152.
1940, 1943, 1945, 1950. Interpretation. *Fabre* v. *Sparks*, 31.
1951. Interpretation. *Marcotte* v. *Coco*, 167.
1968, 1979, 1980. Contracts. *Whiting* v. *Prentice*, 141.
2042. Contracts. *Orleans Theatre Insurance Company* v. *Lafferanderie*, 472.
2072. ——— *Jacobs* v. *Williams*, 183.
2074, 2076. Contracts. *Irish* v. *Wright*, 563.
2077. Contracts. *Jacobs* v. *Williams*, 183.
2081. ——— *Irish* v. *Wright*, 563.
2086, 2087. Contracts. *Jacobs* v. *Williams*, 183.
2092. Contracts. *Ibid.* *Buard* v. *Lémée*, 243.
2094. ——— *Hennen* v. *Bourgeat*, 522.
2099, 2100 Contracts. *Jacobs* v. *Williams*, 183.
2204, 2205. Compensation. *Collier* v. *His Creditors*, 398.
2231, 2232, 2237, 2238, 2242 Contracts. *Hood* v. *Segrest*, 210.
2244. Contracts. *Kendall* v. *Bean*, 407.
2250. ——— *Hood* v. *Segrest*, 210.
2252. ——— *Grove* v. *Harvey*, 221.
2260, 2261. Witnesses. *Keller* v. *McCalop*, 639.
2279, 2280, 2281, 2282, 2284, 2285. Quasi-Contracts. *Marigny* v. *Union Bank*, 283.
2294. Offences and quasi-offences. *Smith* v. *Berwick*, 20. *Spofford* v. *Pemberton*, 162.
2295, 2304. Offences and quasi-offences. *Smith* v. *Berwick*, 20.
2362. Husband and Wife. *Richard* v. *Blanchard*, 524.
2371, 2372. Husband and Wife. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
2373. Husband and Wife. *Succession of Packwood*, 334.
2375. ——— *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
2377. Husband and Wife. *Mercier* v. *Canonge*, 385.

2378. Husband and Wife. *Lynch* v. *Benton*, 113, *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
2379. Husband and Wife. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
2382, 2387. Husband and Wife. *Lynch* v. *Benton*, 113.
2393. Husband and Wife. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
2412. Husband and Wife. *Cuny* v. *Brown*, 82. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
2413, 2414, 2415. Sale. *Barrett* v. *His Creditors*, 474.
2427. Sale. *Balot y Ripol* v. *Morina*, 552.
2431. —— *Barrett* v. *His Creditors*, 474.
2433, 2434. Sale. *Lambeth* v. *Wells*, 51.
2437. Sale. *Barrett* v. *His Creditors*, 474.
2442, 2452, 2453. Sale. *Lambeth* v. *Wells*, 51.
2531. Sale. *Collier* v. *His Creditors*, 398.
2603. —— *Marrionneaux* v. *Marionneaux*, 666.
2604 to 2611. Sale. Forced ex-propriation. *Balot y Ripoll* v. *Morina*, 552.
2612, 2613, 2614. Sale. *Labiche* v. *Lewis*, 8.
2720. Hiring. *Riley* v. *Wilcox*, 648.
2795. Partnership. *English* v. *Wall*, 132.
2797, 2806, 2843, 2844, 2851. Partnership. *Buard* v. *Lémée*, 243.
2963, 2964. Mandate. *Grove* v. *Harvey*, 221.
2965. Mandate. *Smith* v. *McMicken*, 653.
2966. ——— *Grove* v. *Harvey*, 221. *Smith* v. *McMicken*, 653.
2971, 2972. Mandate. *Cammack* v. *Priestly*, 423.
3004. Surety. *Gas Light and Banking Company* v. *Paulding*, 378.
3006. ——— *Irish* v. *Wright—Re-hearing*, 571.
3008. ——— *Gas Light and Banking Company* v. *Paulding*, 378.
3029. ——— *Irish* v. *Wright—Re-hearing*, 571.
3030. ——— *Coons* v. *Graham*, 206.
3184, § 1. Privilege. *Welsh* v. *Shields*, 527.
3268. Mortgage. *Succession of Pigneguy*, 450. *Balot y Ripoll* v. *Morina*, 552.
3280 to 3288. Mortgage. *Cleveland* v. *Sprowl*, 172.
3325. Mortgage. *Whiting* v. *Prentice*, 141.
3327. ——— *Buard* v. *Lémée*, 243.
3374. ——— *Succession of Pigneguy*, 450.
3396, 3398, 3401. Possession. *Whiting* v. *Prentice*, 141.
3415, 3416. Possession. *Williams* v. *Booker—Re-hearing*, 256.
3417. Possession. *Williams* v. *Booker*, 253. *Hiestand* v. *Forsyth*, 371.
3427. Prescription. *Succession of Blakey*, 155.
3429. ——— *Buard* v. *Lémée*, 243.
3442, 3450. Prescription. *Balot y Ripoll* v. *Morina*, 552.
3451. Prescription. *Ibid.* *Lafon* v. *De Armas*, 598.
3480. ——— *Hood* v. *Segrest*, 210.

3486. Prescription. *Buard* v. *Lémée*, 243.
3487. ——— *Succession of Dubreuil*, 507.
3488. ——— *Calvit* v. *Mulhollan*, 258.
3492. ——— *Calvit* v. *Mulhollan*, 258. *Succession of Dubreuil*, 507.
3499, 3503. Prescription. *Owen* v. *Holmes*, 148.
3505. Prescription. *Whiting* v. *Prentice*, 141. *Owen* v. *Holmes*, 148. *Buard* v. *Lémée*, 243.
3508. ——— *Whiting* v. *Prentice*, 141. *Owen* v. *Holmes*, 148.
3516. ——— *Buard* v. *Lémeé*, 243.
3517, 3518. Prescription. *Jacobs* v. *Williams*, 183. *Buard* v. *Lémée*, 243.

III. *Code of Practice.*

20. Pleading. *Orleans Theatre Navigation Company* v. *Lafferanderie*, 472.
43. Petitory action. *Dreux* v. *Kennedy*, 489.
44. ——— *Hiestand* v. *Forsyth*, 371.
149. Cumulation of actions. *Hemken* v. *Ludewig*, 188.
157. Costs. *St. Romain* v. *Robeson*, 194.
172. Petition. *Merrill* v. *Lattimore*, 138.
180. Citation. *Arthur* v. *Cochran*, 41.
206. ——— *Kraeutler* v. *Bank of the United States.—Re-hearing*, 461.
207. Days of public rest. *Keller* v. *McCalop*, 639.
213. Arrest. *Irish* v. *Wright*, 563.
242. Attachment. *Ib.* 563 *Re-hearing*, 571.
243. ——— *Irish* v. *Wright*, 563.
245. ——— *Grove* v. *Harvey*, 221. *Erwin* v. *Commercial and Railroad Bank*, 227.
246, 247, 250, 252. Attachment. *Petway* v. *Goodin*, 445.
254. Attachment. *Kraeutler* v. *Bank of United States.— Re-hearing*, 461.
262. ——— *Petway* v. *Goodin*, 445.
263. ——— *Ib. Poole* v. *Brooks*, 484.
310. Judgment by default. *Arthur* v. *Cochran*, 41.
312. ——— *Poole* v. *Brooks*, 484. *Young* v. *Talbot*, 518.
318. Delay for answering, &c., how computed. *Garland* v. *Holmes*, 421.
329. Pleading. *Riley* v. *Wilcox*, 648.
335. Exceptions. *French* v. *Landis.—Re-hearing*, 635,
351. Interrogatories to parties. *Petway* v. *Goodin*, 445.
360. Joining issue. *Young* v. *Talbot*, 518.
375. Reconvention. *Garland* v. *Holmes*, 421.
397. Opposition of third persons. *Chapelle* v. *Lemane*, 519.
404. Real tender. *Riley* v. *Wilcox*, 648.
457, 458. Reports of auditors. *Flower* v. *Downs*, 101.
463. Setting causes for trial. *Walton* v. *Commercial and Railroad Bank*, 99.
516, 517, 520. Jury. *Spofford* v. *Pemberton*, 162.
536. Nonsuit. *Walton* v. *Commercial and Railroad Bank*, 99.

549, 550, 551. Costs. *St. Romain* v. *Robeson*, 194,
565. Appeal. *State* v. *Judge of Probates of West Baton Rouge*, 315
574, 575, 578. Appeal. *Slater* v. *Commercial and Railroad Bank*, 187.
593. Appeal. *Oliver* v. *Williams*, 180. *Kraeutler* v. *Bank of United States*, 456.
609. Appeal. *Kraeutler* v. *Bank of United States*, 456. *Ib.*—*Re-hearing*, 461.
617, 629. Execution of Judgments. *Chapelle* v. *Lemane*, 519.
642, 543. ——————— *Labiche* v. *Lewis*, 8.
647. Execution of Judgments. *Mayo* v. *Stroud*, 105.
654, 655, 656. Execution of Judgments. *Labiche* v. *Lewis*, 8.
669. Execution of Judgments. *Ex parte Groves*, 130.
677. ——————— *Labiche* v. *Lewis*, 8.
679, 683. Execution of Judgments. *Collier* v. *His Creditors*, 389.
684. Execution of Judgments. *Ex parte Groves*, 130.
722. ——————— *Labiche* v. *Lewis*, 8.
897. Appeal. *Kraeutler* v. *Bank of United States*, 456. *Ib.*—*Re-hearing*, 461.
902. Proceedings in Supreme Court. *Carpenter* v. *Beatty*, 540.
906. ——————— *Taylor* v. *Normand*, 240. *Smith* v. *McMicken*, 653.
907. ——————— *State* v. *Judge of Probates of West Baton Rouge*, 315.
924. Probate Courts. *Hyde* v. *Erwin*, 536.
949. Minor. *Mitchell* v. *Cooley*, 636.
974 to 982. Successions. *Arthur* v. *Cochran*, 41.
983. Successions. *Ib.* *Hyde* v. *Erwin*, 536.
984. ——————— *Arthur* v. *Cochran*, 41. *Dreux* v. *Kennedy*, 489.
985. ——————— *Bank of Louisiana* v. *Déjean*, 16. *Arthur* v. *Cochran*, 41. *Dreux* v. *Kennedy*, 489. *Ib.*—*Re-hearing*, 511.
986. ——————— *Arthur* v. *Cochran*, 41. *Dreux* v. *Kennedy*, 489. *Ib.*—*Re-hearing*, 511.
987, 988, 990, 993. Successions. *Arthur* v. *Cochran*, 41. *Dreux* v. *Kennedy.*—*Re-hearing*, 511.
994, 995. Successions. *Arthur* v. *Cochran*, 41.
996. Successions. *Ib.* *Hyde* v. *Erwin*, 536.
1004. ——————— *Succession of Blakey*, 155.
1054, 1055, 1056, 1057. Successions. *Dreux* v. *Kennedy.*—*Re-hearing*, 511.

COMPENSATION.

1. The amount of a judgment rendered by a court of the first instance, cannot be pleaded in compensation in another action, where an appeal taken from the judgment is yet undetermined. *Kernion* v. *Hills*, 376.

2. When the holder of a protested bill becomes the purchaser of property belonging to the acceptor, sold at the suit of a third person, subject to certain mortgages, for a price exceeding the amount of the previous mortgages, the debts will extinguish each other by operation of law, to the amount of the smallest, by compensation. C. C. 2204. The amount due by the purchaser, after satisfying the previous mortgages, is sufficiently certain. *Id certum est quod certum reddi potest. Collier* v. *His Creditors*, 398.

3. The holder of a protested bill purchased property of his debtor, sold at the suit of a third person subject to a mortgage, the payment of which was assumed by the purchaser as a part of the price. The latter subsequently transferred the bill to a fourth, and after the transfer, the debt secured by mortgage was extinguished by prescription: *Held*, that the amount of the debt so extinguished not being due to the mortgagor until the note was prescribed, and the purchaser having previously transferred the note, no compensation could take place between the debt evidenced by the note, and that for the amount of the mortgage assumed by the purchaser. C. C. 2205. *Ib.*

4. In an action by an executor against the sureties of a former executor to recover money received by the latter belonging to the succession, defendants cannot plead in compensation a debt due by the deceased to their principal. The debt must be settled in the ordinary course of law, contradictorily with all the parties interested. *Fink* v. *Martin*, 416.

CONSTITUTION OF THE STATE.

See CONSTITUTION OF THE UNITED STATES, 2.

CONSTITUTION OF THE UNITED STATES.

1. The seventh section of the statute of Mississippi, of 21 February, 1840, prohibiting the banks of that State from transferring by endorsement or otherwise, any note, bill receivable, or other evidence of debt, and the second section of the statute of 22 February, 1840, requiring that they shall, at all times receive their own notes at par in payment of any debts due them by bill or otherwise, are constitutional, and do not impair the obligation of any contract; and where a judgment obtained by a Mississippi bank has been seized by a creditor of the bank, the debtor is still entitled to discharge it in notes of the bank, at par. *Williams* v. *Planters Bank*, 125.

2, The act of 26 March, 1842, section 9, imposing an annual tax of two hundred and fifty dollars on money and exchange brokers, is not inconsistent with the constitution of the State, nor of the United States.

State v. *Nathan*, 352.

3. The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may be situated in this State, is not in-

consistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress.

Succession of Mager, 584.

CONTRACTS.

1. Where a person writes to his agent that "B. holds a note of F.'s endorsed by N.," and directs him to pay the note without interest, it amounts to a promise to pay the note; and if the holder accept the promise, it will be obligatory on the person by whom it was made. C. C. 1896.

Bell v. *Lawson*, 152.

2. In the interpretation of contracts the common intent of the parties, rather than the literal sense of the terms, should be sought; and where the intent is doubtful, the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation. C. C. 1951. *Marcotte* v. *Coco*, 167.

3. Parol evidence is admissible to show in what manner a contract for the sale of lands has been executed by the parties, and how far the possession has conformed to the act of sale. *Ibid.*

4. Where a creditor accepts from the assignees of the bank a certificate, recognizing him as a creditor for the amount of the certificate, and declaring him or his assigns entitled to the benefit of the assignment, and to a *pro rata* proportion of any dividends which may be declared, his transferree cannot dispute the validity of the assignment. *Per Curiam:* By surrendering to the assignees the original evidence of his claim, and accepting the certificate, the creditor acceded to the conditions of the assignment itself.

Lowry v. *Commercial and Railroad Bank*, 193.

5. Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception.

Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

6. Money placed in the hands of a cashier of a bank to be transmitted to a branch, having been lost through his negligence, to protect himself from suspicion he gave his notes for the amount, endorsed by a third person, the surety on the bond given by the cashier for the faithful discharge of his official duties. The notes having been paid by the endorser, in an action by the latter to recover the amount paid on the ground of error and illegality or want of consideration: *Held*, That the consideration for which the notes were given was not illegal; and that the obligation of the cashier to make good any loss occasioned by his neglect, if not a legal obligation, was, at least, a natural one, and sufficient to prevent the endorser from recovering back the amount paid by him. C. C. 2281, 2285.

Marigny v. *Union Bank of Louisiana*, 283.

7. A promise to pay pre-supposes a consideration. It is for the party seeking to avoid the promise to show that there was none. *Ibid.*

8. Where a promise has been made, a just cause will always be presumed.

It is for the party promising to exonerate himself, by showing that it was without any just or legal cause. *Brashear* v. *Hazard*, 328.

9. A promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own use, and in consequence of a threat, by the company having the exclusive privilege of vending gas, that unless the amount were paid, no gas should be supplied, is void. C. C. 1853. *Gas Light and Banking Company* v. *Paulding*, 378.

10. A debt due by a third person is a sufficient consideration for a promise to pay; but the promise must be unequivocally and freely made, and made to the creditor. C. C. 3004, 3008. *Ibid.*

11. In questions as to the individual liability of persons acting avowedly as agents, the principal inquiry must be to whom was the credit given according to the understanding of both parties; and this is to be ascertained by an examination of the contract itself, the circumstances under which it was made, and the manner in which it had been executed and appears to have been understood, by the parties. *Campbell* v. *Nicholson*, 428.

12. Defendants being authorized by their charter to construct a road on each side of a bayou, and to charge certain tolls thereon, contracted with plaintiffs for the construction of a road on one side, in consideration of conceding to them the tolls thereon for a certain number of years. Plaintiffs were to be at all the expense of the construction and repairs of the road, and, at the expiration of the time fixed on, it was to become the property of defendants. The contract was silent as to the right to make a road on the other side of the bayou. Defendants having constructed a road on the other side of the bayou, before the expiration of the time during which plaintiffs were to receive the tolls on the road constructed by them, an action was commenced by the latter for damages: *Held*, that to entitle plaintiffs to recover they must clearly establish a renunciation by the defendants of their right to construct a second road; and that it is not enough to make it probable that the right was intended to be renounced.

Allard v. *Orleans Navigation Company*, 469.

13. The fact, that some of the makers of a promissory note, who bound themselves jointly and severally, were unauthorized to contract, does not discharge the rest. *Per Curiam:* A co-debtor, *in solido*, cannot plead any exception merely personal to the other co-debtors. C. C. 2094.

Hennen v. *Bourgeat*, 522.

14. Two distinct actions having been commenced by different plaintiffs against the defendant, attachments were levied at the same time on the same property, which were released on the execution of a single bond for the two cases, conditioned that if said defendants shall satisfy such judgments as may be rendered against them in the suits pending, the said obligations shall be void, otherwise remain in full force, &c. The claim of each plaintiff exceeded the amount of the bond, which was silent as to their respective shares in it. On a rule by one of the plaintiffs against the sureties on the bond to show cause why they should not satisfy a judgment obtained by him, and exception by the sureties that plaintiff, being a joint obligee, could not re-

cover against them without joining his co-obligee ; *Held*, that the bond containing distinct obligations to perform different things in favor of different persons, each obligee has a distinct and separate remedy, (C. C. 2074, 2076) ; but that where one plaintiff proceeds against the sureties, before any decision on the claim of the other, he can recover only one-half of the amount of the bond, reserving his right to recover the balance in case the plaintiff in the other action shall be defeated. *Irish* v. *Wright*, 563.

See HUSBAND AND WIFE, III.

COSTS.

Action by plaintiff for the settlement of a particular partnership praying for a sequestration of the partnership property, the liquidation of the partnership affairs, a division of the profits, and the sale of the property. There was a judgment declaring plaintiff in debt to defendant in a certain sum, to be paid out of plaintiff's share of the proceeds of the sale of the partnership effects, which were ordered to be equally divided between the parties. *Held*, that costs are incidental to a judgment, and that plaintiff, having failed to recover, must pay all the costs of the proceedings. *St. Romain* v. *Robeson*, 194.

COURTS.

1. Courts of Probate are competent to decide on the title to real property, when the question arises, directly or collaterally, in a suit for partition. Act 27th March, 1843, ch. 71. *Mayo* v. *Stroud*, 105.

2. Courts of probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration ; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam :* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate. *Hemken* v. *Ludewig*, 188.

3. A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together ; and a probate court is without jurisdiction as to the latter. *Ibid.*

4. The executor of the will of one who was domiciliated and died in another State deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here ; and that part of the estate of the deceased only, is under the control of the courts of this State. *Succession of Packwood*, 334.

5. Where the value of property seized under a *fi. fa.* from a Parish Court,

exceeds the sum to which the jurisdiction of the court is limited, an injunction may be obtained, by one claiming to be the owner of the property, from a District Court. The circumstances of the case make it a necessary exception to the provisions of arts. 397, 617, 629 of the Code of Practice. *Chapelle* v. *Lemane*, 519.

6. A District Court cannot enjoin the execution of a judgment rendered by a Probate Court. *Nolan* v. *Babin*, 531.

7. District Courts have jurisdiction of actions against the curator of an interdicted person to recover a claim against the person interdicted.

Hyde v. *Erwin*, 536.

CURATOR AD HOC.

1. A curator, *ad hoc*, appointed to represent an absent defendant, has no right to appear for the defendant, until regularly cited.

Carpenter v. *Beatty*, 540.

2. A curator, *ad hoc*, cannot waive the production of any evidence necessary to establish the plaintiff's claim; nor can he consent to any judgment being rendered against the absentee, or waive any legal right of the party he is charged to defend. *Ibid.*

See ABSENTEE, 1, 3.

DAYS OF PUBLIC REST.

The first of January is a day of public rest in this State. Act 7th March, 1838, s. 5. *Garland* v. *Holmes*, 421.

DEFAULT, JUDGMENT BY.

See JUDGMENT BY DEFAULT.

DONATIONS INTER VIVOS.

1. Where the deceased, has left no legitimate children or descendants, but a legitimate brother and sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *inter vivos*, not more than one-fourth in value of his property. C. C. 1473.

Compton v. *Prescott*, 56.

2. Parol proof that a promissory note payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523. *Morres* v. *Compton*, 76.

DONATIONS MORTIS CAUSA.

I. *Execution and Proof of Testaments.*

II. *Power to Dispose, and Interpretation of Testaments.*

I. *Execution and Proof of Testaments.*

1. It is essential to the validity of a nuncupative will by public act that it be expressly stated in the instrument that it was read to the testatrix in the presence of the necessary witnesses. C. C. 1571, 1588. Thus where the will states; "*Que la dite comparante testatrice a dicté ses dernières volontés, en présence de* [mentioning three witnesses,] *tous trois de l'âge de majorité et domiciliés dans cette paroisse, écrit de suite par moi, le dit juge, sans interruption et sans divertir à d'autres actes. Alors j'ai lu le dit acte, à la dite testatrice; qui a déclareé qu'elle le comprenoit, et qu'elle l'approuvoit dans tout son contenu. Dont acte fait, &c.*"—it will be declared invalid as a nuncupative will by public act, reserving the right to those interested, of establishing its validity as a nuncupative testament by private act. C. C. 1583. *Succession of Sparks*, 35.

2. The fact that a nuncupative will, by public act, was read to the testatrix in the presence of the necessary witnesses, must appear from the instrument itself. The words in which the statement is made, are immaterial, provided they be such as to leave no doubt that the formality was complied with.

Ibid.—Re-hearing, 37.

3. The fact that a nuncupative testament by public act was executed by the testator, under a name which he had assumed for political reasons, and by which he had been known for many years, will not vitiate the will, where the circumstances of the case show, that the name was not used *in fraudem legis*, nor to defeat the rights of his legitimate heirs.

Balot y Ripoll v. *Morina*, 552.

4. The son-in-law of a legatee is competent as a witness to the will. The relations and connections of a legatee are not incompetent to prove a will. C. C. 1585. Arts. 2260, 2261 of the Civil Code do not apply to witnesses to a will. *Keller* v. *McCalop*, 639.

5. As a general rule, all persons are competent as witnesses to a will unless expressly excluded. *Ibid.*

6. It is no objection to a will by public act, that it was not executed at the office of the notary, nor that it was executed on a Sunday. *Ibid.*

7. Where a testament by public act recites, "that this last will was dictated by the testatrix to me, the said notary public, by whom it was written as dictated to me, and then read to the testatrix, who declared to have perfectly understood it and to persist therein, all of which was done in the presence of the said attending witnesses," it is sufficient proof that the will was read to the testatrix in the presence of the witnesses, that it was dictated by her at the time it purports to have been signed, that it was written as dictated, and that it was read to the testatrix by the notary. *Ibid.*

8. The formalities prescribed by art. 1571 of the Civil Code for the execution of nuncupative testaments by public act, must be fulfilled at one time, without interruption, and without turning aside to other acts; but it is not necessary that express mention should be made in the will that they have been

so fulfilled. It is for the party who attacks the will to show that they have not been so fulfilled. *Ibid.*

II. *Power to Dispose, and Interpretation of Testaments.*

9. Article 1474 of the Civil Code, which declares, that where the father disposes in favor of his natural children, of the portion which the law permits him so to dispose of, he shall dispose of the rest of his property, in favor of his legitimate relations, unless he bequeath it to some public institution, does not constitute his legitimate relations, his forced heirs for the rest of his estate; nor does it render void the disposition in favor of his natural children, though he make no disposition of the residue of his estate, or subsequently dispose of it, in favor of persons not his legitimate relations; such subsequent dispositions are absolutely null, and the remainder will go to his legal heirs. If he make any disposition of such remainder, it must be in favor of some public institution, or of his legitimate relations, but, where there are no forced heirs, he may bequeath it to such of them, one or more, as he may select. *Compton* v. *Prescott*, 56.

10. A testator, without children or descendants, after several particular legacies, one of which was a legacy, under an universal title, of one-fourth of his whole property to his natural children, bequeathed all the remainder of the estate, which he then owned or might afterwards acquire, both real and personal, to four nieces, to be equally divided between them. The particular legacies, except one of a sum of money to another niece, either failed from the incapacity of the legatees, or were reduced. *Held*, that by leaving the remainder of his estate to be divided between his four nieces, the testator intended to give them only what might remain, after the payment of the previous particular legacies; that they are not universal legatees (C. C. 1599,) but legatees under a universal title (C. C. 1604): that not being bound by the will to discharge any of the particular legacies, they cannot benefit by their failure or reduction (C. C. 1697); and that the legacies which have failed, or the amounts by which they have been reduced, must be considered as portions of the estate remaining undisposed of, devolving under article 1702, upon the legal heirs. *Ibid.*

11. Art. 1478 of the Civil Code, which, after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved. *Ibid.*

12. Where the deceased has left no legitimate children or descendants, but a legitimate brother or sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *mortis causa*, not more than one-fourth in value of his property. C. C. 1473. *Ibid.*

13. A testator leaving three or more children, or the descendants of three or

more children, cannot dispose by donation *mortis causa* of more than one-third of his property. C. C. 1480. *Webber* v. *Goodby*, 539.

14. Grandchildren, forced heirs of the testator by representation of their mother, are bound to collate any legacy made to them by the testator, unless expressly made as an advantage over their co-heirs and besides their legitimate portion. C. C. 1306, 1307. *Ibid.*

15. A clause in a will directing that certain slaves shall be emancipated at a future period, and transported to Africa, will not be rendered void by a provision directing, in case of their return to the State, that they shall again become slaves. The illegality of the condition does not render the previous provision null. *Rost* v. *Henderson*, 549.

16. The testator having provided that ten slaves should be drawn by lot out of the whole number belonging to his estate, and transported to Africa, if willing to go, among the number so drawn was one under eleven years of age. In an action by the executors to compel the heirs of the deceased to give up the slaves so drawn, to be transported as directed by the testator, *Held:* that the slave under eleven years of age, being unable to give his consent, the provision of the will cannot be carried into effect as to him. *Ibid.*

17. Where a testator leaves no legitimate children nor descendants, but legitimate brothers or sisters, or descendants from them, an acknowledged natural child may receive from him, by donation *mortis causa*, one-fourth of his property. C. C. 3473. *Balot y Ripoll* v. *Morina*, 552.

18. Where by a donation *mortis causa* a testator disposes, in favor of an acknowledged natural child, of more than the law allows, the disposition is not null for the whole, but reducible to the *quantum* allowed by law. C. C. 1489. *Ibid.*

19. A donation *mortis causa* may be made in favor of a foreigner, where the laws of his country do not prohibit a similar disposition from being made in favor of a citizen of this State. *Succession of Mager*, 584.

20. A bequest by a testatrix of "all her property," includes moveables as well as immoveables, separate as well as partnership property, and all transmissible rights, whether dotal, paraphernal, or belonging to the community. *Keller* v. *McCalop*, 639.

21. By a will executed in the State of South Carolina, a testatrix declared as follows: "I give to my daughter S. S. C., one-fifth of all my estate, both real and personal, during her natural life, and afterwards to her children, the heirs of her body, forever." The children were in being at the time of the devise. In an action by the heirs of the daughter, claiming certain slaves who belonged to the testatrix: *Held*, that this was a donation of the slaves to the daughter for her natural life, and afterwards to her children, the heirs of her body, forever. *Calmes* v. *Carruth*, 660.

See SUCCESSIONS, 33.

ELECTIONS, INSPECTOR OF

See Offences and Quasi Offences.

ERROR.

A judgment of nonsuit having been set aside, and a new trial allowed, at the succeeding term after the new trial had, and a judgment entered on the minutes for the plaintiff, the judge by mistake signed the judgment of nonsuit, which had been transcribed on the petition. *Held*, that the judgment of nonsuit, having been set aside within the time prescribed by law, was a nullity, and could not be reinstated by the subsequent inadvertent signature of the judge *Hatch* v. *English*, 153.

EVIDENCE.

I. *Onus Probandi.*
II. *Presumption.*
III. *Competency of Witness.*
IV. *Commission to take Testimony.*
V. *Judicial Records and Proceedings, and copies thereof.*
VI. *Non-Judicial Records and other Written Instruments.*
VII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in Value.*
VIII. *Admissibility of Evidence to Explain Written Instruments.*
IX. *Admissibility of Evidence under the Pleadings.*
X. *Proof of Fraud.*
XI. *Proof of Acknowledgment of Illegitimate Children.*
XII. *Proof of Donations Inter Vivos.*
XIII. *Proof of Donations Mortis Causa.*
XIV. *Evidence of Parties.*
XV. *Evidence in particular Actions.*
1. *In Actions to Annul Sales of Community Property.*
2. *In Actions on Bills of Exchange or Promissory Notes.*
3. *In Actions on Particular Contracts.*
4. *In Petitory Actions.*
5. *In the Settlement of Successions.*
6. *In the Settlement of Tutors' Accounts.*
7. *In Summary Proceedings in rem for cost of work on Levées.*
8. *In Proceedings Via Executiva.*

I. *Onus Probandi.*

1. Where an act of sale is attacked by a creditor of the vendor as simulated,

on the ground that no price was paid, proof of payment of the price is on the party interested to maintain the sale. The creditor cannot be required to prove a negative. *Fisher* v. *Moore*, 95.

2. A promise to pay pre-supposes a consideration. It is for the party seeking to avoid the promise to show that there was none.

Marigny v. *Union Bank of Louisiana*, 283.

3. The burden of proof is on the party affirming. *Ibid.*

4. Where a promise has been made, a just cause will always be presumed. It is for the party promising to exonerate himself, by showing that it was without any just or legal cause. *Brashear* v. *Hazard*, 328.

5. Defendants sued by the transferree of a note made by them, but not negotiable, pleaded their discharge under the insolvent laws. The schedule of the insolvents showed, that the payee of the note was placed on it as a creditor for a sum exceeding the amount of the note. It was not proved that the note had been transferred to plaintiff, nor that defendants were notified of the transfer previously to filing their *bilan*. *Held*, that it was for the plaintiff to show that the amount for which the payee was placed on the *bilan* as a creditor did not include the note sued on; and there being no allegation that defendants have acquired any property since their discharge, that there must be a judgment of nonsuit. *Vauquelin* v. *Platet*, 381.

6. Where a factor transmits to his principal accounts of the sales of his crops, and of advances of money and purchases made for him, and proves their receipt by the principal, and the latter receives such accounts without objection, and acknowledges the receipt of the articles purchased for him, he will be presumed to have assented to the correctness of the account; and in an action by the factor for a balance due to him, the burden of proving that the crops sold for more, or that the articles furnished had been purchased for less than the account shows, is on the defendant.

Ledoux v. *Porche*, 543.

See 38, 58, *infra*. CONTRACTS, 12.

II. *Presumption.*

7. Art. 1478 of the Civil Code, which after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved. *Compton* v. *Prescott*, 56.

8. Property of all kinds found in the possession of a person at the time of his death, is presumed to belong to his succession. *Lynch* v. *Benton*, 113.

9. A promise by a third person to pay a bill or note for the endorser, to be binding on the former, must be made with full knowledge by him of any want of due diligence on the part of the holder which may have exonerated the endorser; but direct proof of such knowledge is not necessary. It may

be inferred from the promise under the attending circumstances, as where the promise was to pay the principal due, without interest. In such a case it will be inferred that the circumstances discharging the endorser were known, for, if the protest were regular, interest would run from its date.

Bell v. *Lawson*, 152.

10. Where the judge before whom an action on a twelve-months bond was tried was sworn as a witness to prove a signature, but the record omits to state the name of the person whose signature he was sworn to prove, though it shows that a judgment was rendered by the same judge in favor of the plaintiff, it will be presumed that the person, the proof of whose signature was essential to a recovery, was the one whose signature was actually proved. *Coons* v. *Graham*, 206.

See 2, 4, 6, *supra*.

III. *Competency of Witness.*

11. Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared, that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Williams v. *Planters Bank*, 125.

See 35, 36, *infra*.

IV. *Commission to take Testimony.*

12. Where the names of some of the witnesses whose testimony has been taken under a commission were not mentioned in the commission, nor in the notice given to the other party to attend at the time and place fixed by the commissioner for taking the evidence, their testimony will not be admissible.

Flower v. *Downs*, 101.

V. *Judicial Records and Proceedings and Copies thereof.*

13. Proceedings in an action of partition, cannot be offered in evidence against one not a party to the action. Nor will the fact of his not having exhibited any title, or plat of survey, to the surveyor engaged in making such partition, though aware of the proceedings, affect his rights. He was not bound to exhibit any evidence against himself, and had a right to stand upon his possession. *Hemken* v. *Brittain*, 46.

14. Although on a prayer of *oyer* by defendant, the object of which is to obtain information to aid him in shaping his defence, plaintiff file a mutilated or imperfect copy of a will, he will not be precluded from giving in evidence, on the trial, a true and authentic copy of the instrument on which he relies as his muniment of title. *Graves* v. *Hemken*, 103.

15. Where the names of the signers of a twelve-months bond do not appear in the body of the instrument, nor in the return of the sheriff, and there is

no attestation by the sheriff that it was signed before him, or in the presence of witnesses, the signature of a surety must be proved, to entitle the party in whose favor it was made, to recover against such surety.

Coons v. *Graham*, 206.

16. A return by a marshal on an attachment, "that he had executed the writ by seizing in the hands of A. all sums of money, rights, credits, and property belonging to the defendant, to an amount sufficient to satisfy the debt," &c., is alone no evidence that any thing was actually seized.

Poole v. *Brooks*, 484.

17. Where the records of a court of justice show that a judgment was pronounced on a particular day, evidence of witnesses is inadmissible to show that no such judgment was pronounced. *Per Curiam:* Parol evidence is inadmissible to contradict the records of a court of justice.

Nolan v. *Babin*, 531.

VI. *Non-Judicial Records and other Written Instruments.*

18. A declaration by the vendor in an act of sale *sous seing privé*, that the price had been paid, is not proof of payment against third persons.

Fisher v. *Moore*, 95.

19. A bill of lading is evidence of a shipment as between the carrier and shipper, but not of delivery to the consignee. *Flower* v. *Downs*, 101.

20. Where it is proved that one of the subscribing witnesses to a power of attorney is dead, and that the residences of the others are out of the State or unknown, it will be admissible in evidence on proof of the signature of the principal.

Grand Gulf Railroad and Banking Company v. *Barnes*, 127.

21. Where an act of sale of real property was signed by the parties in the presence of a parish judge, acting as a notary, no other proof of execution is necessary to authorize its being recorded, and to give it the effect against third persons which the law allows to acts *sous seing privé* duly registered. C. C. 2242, 2250. *Hood* v. *Segrest*, 210.

22. An act of sale, not authentic, owing to the want of the signature of one of the witnesses, or through any other defect of form, is good as a private writing, if signed by the parties. C. C. 2232. *Ibid.*

23. The private account books of brokers are not admissible in evidence in their favor, (C. C. 2244); but witnesses by whom entries were made in them, of matters within their personal knowledge, may refer to such entries to refresh their memory. *Kendall* v. *Bean*, 407.

24. The letters of a party acknowledging that, in consideration of a certain sum, a third person had become jointly and equally interested with him in the purchase of real estate held in his name, and agreeing, for a fixed price, to convey to the same person one-half of his interest in a purchase of other lands, is evidence of a sale as between the parties, and the lands may be mortgaged by the purchaser, or subjected to legal mortgages as his property. *Per Curiam:* A sale, as between the parties, is complete as soon as there exists an agreement as to the object and the price, though the object

be not delivered, nor the price paid, (C. C. 2413, 2431); the only formality required by law, as between the parties, is that the sale, when of immoveables, shall be in writing. C. C. 2415. *Barrett* v. *His Creditors*, 474.

See 41, *infra*.

VII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in Value.*

25. To enable a party to recover the amount of a promissory note alleged to have been deposited with defendant as collateral security, the proceeds of which, exceeding five hundred dollars, were received by the defendant, the deposit must be proved by the testimony of at least one witness, supported by corroborating circumstances. *Escurieux* v. *Chapdu*, 520.

VIII. *Admissibility of Parol Evidence to Explain Written Instruments.*

26. Parol evidence is admissible to show in what manner a contract for the sale of lands has been executed by the parties, and how far the possession has conformed to the act of sale. *Marcotte* v. *Coco*, 167.

27. Parol evidence is admissible to show that the land in dispute is not included in the conveyance under which plaintiff claims. *Per Curiam:* The fact might have been more properly shown by a survey of the premises, or by a plan annexed to the act of sale; but in their absence, parol evidence is admissible. *Hiestand* v. *Forsyth*, 371.

IX. *Admissibility of Evidence under the Pleadings.*

28. A plaintiff may introduce any evidence necessary to disprove or rebut the allegations made by the defendant in his answer, though the facts offered to be proved by the former were not alleged in the petition. No replication being allowed, all new facts alleged in the answer are considered as denied. C. P. 229. *Riley* v. *Wilcox*, 648.

29. Where, in an action for wages as an overseer, plaintiff alleges that he was engaged for one year from the first of January, and that he performed the duties of an overseer from that day, he will not be allowed to show that, although he was engaged from that day it was understood between the contracting parties, that he was not to take full charge of the plantation till the 6th of the month. If the contract was subject to such a condition, it should have been alleged. *Ibid.*

X. *Proof of Fraud.*

30. A creditor having obtained a judgment against his debtor, caused certain property to be sold under execution, and became the purchaser. In an action by other creditors, against the debtor and purchaser, to annul the sale as fraudulent and intended to give an unjust pr ference to the latter, plaintiffs offered to prove declarations made by the debtor, out of the presence of the seizing creditor, tending to establish the fraudulent intention of the par-

ties: *Held*, that the evidence, though insufficient to prove the alleged fraud as against the seizing creditor, was admissible.

Whiting v. *Prentice*, 141.

31. To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent.

Ibid.

32. Fraud will not be presumed; like other allegations it must be proved; but it may be proved by circumstantial as well as by direct evidence; by simple as well as by legal presumptions. C. C. 1842.

Marigny v. *Union Bank*, 283.

See 48, *infra*.

XI. *Proof of Acknowledgment of Illegitimate Children.*

33. Illegitimate children of color, not the offsping of an incestuous or adulterous connection may prove their acknowledgment, by a white father, where such acknowledgment has been made by the latter, in a declaration before a notary public, in presence of two witnesses, not in the registry of the birth or baptism of such child; but no other proof of acknowledgment is admissible in favor of colored children, claiming descent from a white father. C. C. 221, 222, 226. *Compton* v. *Prescott*, 56.

XII. *Proof of Donations Inter Vivos.*

34. Parol proof that a promissory note, payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523. *Morres* v. *Compton*, 76.

XIII. *Proof of Donations Mortis Causa.*

35. The son-in-law of a legatee is competent as a witness to the will. The relations and connections of a legatee are not incompetent to prove a will. C. C. 1585. Arts. 2260, 2261 of the Civil Code, do not apply to witnesses to a will. *Keller* v. *McCalop*, 639.

36. As a general rule, all persons are competent as witnesses to a will unless expressly excluded. *Ibid.*

37. Where a testament by public act recites, "that this last will was dictated by the testatrix to me, the said notary public, by whom it was written as dictated to me, and then read to the testatrix, who declared to have perfectly understood it and to persist therein, all of which was done in the presence of the said attending witnesses," it is sufficient proof that the will was read to the testatrix in the presence of the witnesses, that it was dictated by her at the time it purports to have been signed, that it was written as dictated, and that it was read to the testatrix by the notary. *Ibid.*

38. The formalities prescribed by art. 1571 of the Civil Code for the execution of nuncupative testaments by public act must be fulfilled at one time, without interruption, and without turning aside to other acts; but it is not necessary that express mention should be made in the will that they have been so fulfilled. It is for the party who attacks the will to show that they have not been so fulfilled. *Ibid.*

XIV. *Evidence of Parties.*

39. Where interrogatories are propounded by defendant to a plaintiff who resides in another state, and the order to answer them fixes no period within which the answers shall be made, and it is not proved that the attorney of the absentee was served with any notice of the order or a copy of the interrogatories, they cannot, on failure of plaintiff to answer, be taken for confessed. Act 10 February, 1843. *Graves* v. *Hemken*, 103.

40. Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient. *Commercial Bank of Natchez* v. *Guice*, 181.

41. The acknowledgment by the vendor, in an authentic act of sale of real estate, that the price had been received by him, can be contradicted only by a counter letter, or by the acknowledgment of the purchaser, or his heirs, in answer to interrogatories on facts and articles.

Succession of Thomas, 215.

42. In proceedings under the 13th section of the act of March 20, 1839, by which a plaintiff who has applied for a writ of *fi. fa.* is authorized to propound interrogatories to a third person, believed to have property in his possession, or under his control, belonging to the debtor, or to be indebted to him, the formalities of law must, as in cases of attachment, be strictly complied with, under penalty of nullity. Thus, where interrogatories have been propounded to a third person to be answered in open court within a certain time, and they are ordered to be answered "as prayed for and according to law," but without any particular day having been appointed therefor, the party interrogated is not bound to answer, and, on his failure to do so, the interrogatories cannot be taken *pro confessis*. Where interrogatories are required to be answered in open court, the plaintiff must move the court to appoint a day on which the answer shall be made; and where he proceeds to trial without having done so, his right to have the interrogatories answered will be considered as waived. *Petway* v. *Goodin*, 445.

43. Garnishees in cases of attachment, and third persons to whom interrogatories are authorized to be propounded by the 13th section of the statute of 20th March, 1839, are parties to the controversy at least as between the plaintiff and themselves, and may be required to answer, in open court, any interrogatories propounded to them. *Ibid.*

44. One who resides out of the State may appeal from a judgment rendered against him at any time within two years from the day on which final judgment was rendered (C. P. 593); and where plaintiffs allege in their petition

and affidavit for an attachment that defendants are non-residents, it is sufficient evidence of such non-residence.

Kraeutler v. *Bank of United States*, 456.

45. Where one to whom interrogatories have been propounded under the 13th sect. of the act of 20 March, 1839, fails to answer within the delay fixed, such failure will, as in the case of a garnishee, be considered as a confession of his having property belonging to the debtor sufficient to satisfy the demand, and a final judgment may be rendered against him, on motion, without notice, for the amount of the demand, with interest and costs. C. P. 263. *Aliter*, where the party interrogated denies being indebted, and it is attempted to disprove his answers; in such a case an issue is joined, and the party must have an opportunity of being heard before he can be condemned. *Poole* v. *Brooks*, 484.

46. To disprove answers made under oath by a party to a suit to whom interrogatories have been propounded, the testimony must be positive and certain. *Graneri* v. *Talbot*, 526.

47. A party to the record is inadmissible as a witness.

Baudoin v. *Nicolas*, 594.

XV. *Evidence in Particular Actions.*

1. *In Actions to annul Sales of Community Property.*

48. To annul a sale of community property made by a husband, it is not enough, under art. 2373 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife. *Succession of Packwood*, 334.

2. *In Actions on Bills of Exchange and Promissory Notes.*

49. The certificate of a notary that he presented a note, which was payable at the office of a parish judge, at the said office, to a person in the office, and demanded payment thereof, and was informed that there were no funds to pay it, is sufficient evidence of demand against the drawer of the note.

Dosson v. *Sanders*, 238.

50. In an action on a bill accepted by an agent, the evidence of witnesses who testify that they had seen the written authority by which defendants empowered the agent to accept bills for them, will be admissible, where the power itself is not in plaintiff's possession, nor under his control.

Kraeutler v. *Bank of United States*, 456.

51. Action by the holder against the maker of a note, endorsed by the payee in blank, and on which the latter had written an acknowledgment of the receipt of its value from the plaintiff, and at the same time warranted its payment to the plaintiff, or his assigns: *Held*, that judgment by default could not be confirmed against the defendant, without proof of the endorsement of the payee, and of his signature to the transfer written on the note. Proof of a plaintiff's demand is required in all cases when not admitted by the defendants. C. P. 312, 360. *Young* v. *Talbot*, 518.

3. *In Actions on Particular Contracts.*

52. Where a purchaser promises in a written memorandum signed by him, to pay the price "by acceptance and note," the vendor must prove a demand of such acceptance and note, to entitle him to recover in an action on the memorandum for the price in money. *Offutt* v. *Morancy*, 92.

53. To entitle a plaintiff to recover on a contract executed by a person acting as an agent, the authority of the agent must be proved.
Carpenter v. *Beatty*, 540.

4. *In Petitory Actions.*

54. Where a plaintiff claims to be the owner of land which he alleges that the defendant has taken possession of and refuses to deliver, and prays for a judgment for the land with damages for its detention, he must prove his own title, and show that it covers the land in the adverse possession of the defendant. *Henken* v. *Brittain*, 46.

55. In a petitory action the plaintiff must make out a valid title in himself, or judgment will be given for the defendant. *Hiestand* v. *Forsyth*, 371.

5. *In the Sett'ement of Successions.*

56. An admission of the genuineness of the signature to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payments claimed by him; but where such payments are made, without any order of court, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller* v. *Miller*, 88.

57. Where one, who claims to be the creditor of a succession for the amount of an open account, in which he charges the estate with the amount of a draft drawn by the deceased and accepted by him, and with a commission for accepting it, neither produces the draft nor accounts for it, nor shows that it was paid by him, his claim must be rejected.
Succession of Floyd, 197.

6. *In the Settlement of Tutors' Accounts.*

58. Where, after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333. *Mercier* v. *Canonge*, 386.

59. A tutor being bound to procure medical assistance, when necessary, for the minor, the receipt of a physician for the amount of his fees for such ser-

vices paid by the tutor, and admitted without opposition, is a sufficient voucher to entitle the latter to credit for the amount. *Per Curiam:* A tutor is not bound to procure evidence of the necessity for such services, where the amount paid is not large, and nothing authorizes the presumption that the payment was improperly made.

Richard v. *Blanchard*, 524.

7. In Summary Proceedings in rem for Cost of work on Levées.

60. Where the police regulations of a parish require that notice in writing shall be given to resident proprietors personally, or at their domicil, of all work required to be done on any levée, the land on which such work is to be done, if the property of a resident proprietor, cannot be made liable, by a summary proceeding *in rem*, for the cost of such work, though executed in pursuance of an adjudication by the overseer of roads and levées, without proof of written notice, served personally, or at the domicil of the proprietor. The certificate of the inspector of roads and levées is not conclusive proof of notice, as against the proprietor; and parol evidence is admissible to prove that no sufficient notice was given. *Hamilton* v. *Michel*, 593.

8. In Proceedings Via Executiva.

61. The authentic evidence required to authorize the issuing of an order of seizure and sale must be complete so far as relates to the debt. Thus, where a mortgage by authentic act was executed under power of attorney, or where a note secured by such a mortgage has been assigned, the power and the assignment must be proved by authentic acts. As relates to the capacity of persons suing *en auter droit*, *prima facie* evidence of their right is sufficient. In such a case, copies of the bond and oath of a curator, certified under the hand and seal of the probate judge to be true copies from the originals on file in his office, will be sufficient evidence of the capacity of the plaintiff, though the letters of curatorship would be perhaps, better evidence. *Dosson* v. *Sanders*, 238.

EXCEPTION.

See PLEADING, IV.

EXCHANGE AND BANKING COMPANY OF NEW ORLEANS.

The 27th section of the statute of 1st April, 1835, incorporating the Exchange and Banking Company of New Orleans, authorizing a "wife to bind herself jointly and *in solido* with her husband in all hypothecary contracts or obligations entered into by him in favor of that institution," does not empower a wife to bind herself with her husband, for the price of stock of the company, purchased in her name during the existence of the matrimonial community. *Per Curiam:* The provision in favor of the bank being in derogation

of the general rule prescribed by art. 2412 of the Civil Code, must be strictly construed. It cannot be extended to cases not clearly within its purview.

Commissioners of Exchange and Banking Company v. *Bein*, 579.

EXECUTION OF JUDGMENT.

1. Where property has been seized under a *fi. fa.*, before the return day, the sheriff may retain the writ, and sell the property after the time fixed for its return. *Labiche* v. *Lewis*, 8.

2. To prevent the sacrifice of debts seized under a *fi. fa.*, the parties to the execution agreed that the sheriff should suspend the sale and retain the writ after the return day, authorizing an agent to proceed to collect the debts. Other creditors of defendants in execution, subsequently to this agreement, levied a *fi. fa.* on the same debts in the hands of the sheriff, and it was agreed between them and the plaintiff in the original execution, that the debts should be sold under the first writ, "the proceeds of the sale to be held by the sheriff, subject to the orders of the proper court." In an action to determine which of the seizing creditors was entitled to the proceeds: *Held*, that no bad faith being imputed to the parties, they had a right to suspend the sale: that the debts never ceased to be under the control of the sheriff; that having permitted the sale to be made under the first execution, the creditors in the second execution cannot attack its legality; and that the creditor who first seized is entitled to a preference on the proceeds of the sale. C. P. 722. *Ibid.*

3. Notice to the debtors is not required where debts or credits have been seized under a *fi. fa.*; such notice is only necessary where a debt or credit has been transferred or assigned. The seizure of a debt does not transfer the property in it to the seizing creditor; it gives him only a right to be paid out of its proceeds when sold, until which time the defendant is not divested of his title. *Ibid.*

4. Where slaves have been seized under a *fi. fa.*, and the sheriff, with the consent of the plaintiff in execution, leaves them with the debtor until the day of sale, they will be considered as in the legal custody of the sheriff; and one proved to have aided the debtor in removing them beyond the limits of the State, with a view to defraud his creditors, will be responsible to the latter to the extent of the injury they may sustain in consequence, and the full value of the slaves will be the measure of damages, if the debt amounts to so much. C. C. 2294, 2295, 2304. Testimony that will satisfy a jury of the guilt of the defendant is sufficient to maintain the action; and every fact proved, calculated to produce this conviction, should be considered, in coming to a conclusion as to his knowledge of the fraud.

Smith v. *Berwick*, 20.

5. The undivided share of an heir in a succession may be seized and sold under execution (C. P. 647); but a creditor of an heir cannot seize and sell the right of his debtor to a part of the property inherited by him. The seizure must be of the whole of his rights in the succession, subject to the charges with which they may be burthened. *Mayo* v. *Stroud*, 105.

6. A sale under *fi. fa.* made before the promulgation of the statute of 6 April, 1843, ch. 135, in a parish in which a newspaper was published at the time, and not advertised therein as directed by art. 669 of the Code of Practice, will be annulled, unless in cases embraced by the statute of 2 February 1828, ch. 29, where the amount of the judgment under which the seizure was made, is less than three hundred dollars. *Ex parte Groves*, 130.

7. Where the price bid at a sale under a *fi. fa.* does not exceed the amount of anterior special mortgages existing on the property, there can be no adjudication. C. P. 684. *Ibid.*

8. Where a *fi. fa.* has been issued against a defendant before notice of judgment served on him as required by law, he may require that the *fi. fa.* be quashed, and a suspensive appeal allowed. But where he contents himself with taking a devolutive appeal only, he cannot afterwards complain. *Hatch* v. *English*, 135.

9. Where the owner of property seized under execution becomes its purchaser, at a credit of twelve months, he cannot be considered as acquiring any new right or title by the adjudication, which is not strictly a sale, but a means by which the creditor acquires additional security for his debt. Nor will the sureties on the bond be discharged by the omission of the creditor to require the execution of an act of sale to the debtor, with the reservation of a mortgage on the property to secure the price, though the sureties might, for their own protection, have insisted on such an act of sale being executed and recorded. *Aliter*, if, having received a mortgage, the creditor had subsequently released it; in such a case the sureties would be discharged. C. C. 3030. *Coons* v. *Graham*, 206.

10. Where the principal in a twelve-months bond is estopped by his execution of the bond from urging any informalities in the sale, as a defence to an action on the bond, his sureties, bound *in solido* with him, will be equally estopped from setting up any such defence. *Ibid.*

11. Plaintiff having seized, under a *fi. fa.*, a sum in the hands of a third person, as the property of defendants, his debtors, the State intervened, alleging that the amount had been illegally paid to such third person by the treasurer: *Held*, That the payment being unauthorized, the amount should be returned into the treasury. *Gore* v. *Commercial Library Society*, 311.

12. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Collier* v. *His Creditors*, 389.

13. An overseer being entitled to one-fourth of the crop for his services, a creditor of the owner of the plantation seized under a *fi. fa.* three-fourths of the growing crop, and became the purchaser thereof at the sheriff's sale. In an action by the overseer against the purchaser; *Held*, that the seizure did not operate as a partition between the overseer and his employer, nor restrict the right of the former to the fourth not seized; and that the purchaser, acquiring no greater right than his debtor had, is liable to the overseer for one-fourth of the price for which the three-fourths of the crop were sold. *Baudoin* v. *Nicolas*, 574.

EXECUTOR.

See SUCCESSIONS, IV.

EXECUTORY PROCESS.

The authentic evidence required to authorize the issuing of an order of seizure and sale must be complete so far as relates to the debt. Thus where a mortgage by authentic act was executed under power of attorney, or where a note secured by such a mortgage has been assigned, the power and the assignment must be proved by authentic acts. As relates to the capacity of persons suing *en auter droit*, *prima facie* evidence of their right is sufficient. In such a case, copies of the bond and oath of a curator, certified under the hand and seal of the probate judge to be true copies from the originals on file in his office, will be sufficient evidence of the capacity of the plaintiff, though the letters of curatorship would be, perhaps, better evidence. *Dosson* v. *Sanders*, 238.

FIERI FACIAS.

See EXECUTION OF JUDGMENT.

FRAUD.

1. To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent. *Whiting* v. *Prentice*, 141.

2. Fraud will not be presumed; like other allegations it must be proved; but it may be proved by circumstantial as well as by direct evidence; by simple as well as by legal presumptions. C. C. 1842. *Marigny* v. *Union Bank*, 283.

3. The holder of a negotiable note given for the price of property fraudulently sold by a debtor after obtaining a respite, cannot recover on it, though taken before maturity, where the evidence shows that he was aware of the fraudulent character of the sale. *Pralon* v. *Aymard*, 486.

See EVIDENCE, 30, 48.

HUSBAND AND WIFE.

I. *Paraphernal Property.*
II. *Community of Gains.*
III. *Contracts of Married Woman.*

I. *Paraphernal Property.*

1. A husband has authority to receive whatever may be due to his wife on account of her paraphernal property, when such property is not proved to be under her sole and separate administration; and a payment to him will discharge the debtor. C. C. 2362. *Richard* v. *Blanchard*, 524.

See 12, *infra.*

II. *Community of Gains.*

2. Where it is stipulated by the first clause of a marriage contract, that, "there shall be a community between the parties, which shall comprehend all their estate, real and personal, present and to come," and by a subsequent one that, "in case of the death of either the husband or wife, without having a child or children by the marriage, the amount of the property brought into the community by the one that shall die first, with the profits arising from the community, shall revert to the surviving husband, or wife, as the case may be," the words "*property brought into the community*," used in the latter clause, will be construed with reference to the first, which establishes what property the community shall consist of; and in case of the death of the wife without issue of the marriage, the surviving husband will be entitled to all the estate "real and personal, present and to come," of which, by the first clause of the contract, it is declared that the community shall be composed. *Fabre* v. *Sparks*, 31.
3. A wife, who has concealed or converted to her own use, without accounting therefor, or made away with any of the effects of the community of gains, cannot renounce the community. C. C. 2387. But for whatever cause she may have forfeited the right of renouncing, she can be made responsible only for one-half of the debts contracted during the marriage. C. C. 2378. *Lynch* v. *Benton*, 113.
4. A wife may render herself personally liable for one-half the debts of the community, by her acts, though done without any fraudulent intent; as by taking an active concern in the affairs of the succession, or by failing to make an inventory, before making her renunciation, and within the legal delays, &c. *Ibid.*
5. Where plaintiffs claim, as heirs of their mother, one-half of certain community property sold by the husband after the death of the wife, and the vendee proves that the price of the property was applied to the payment of the debts of the community, he will be entitled to the reimbursement of the amount so paid for its benefit, in proportion to plaintiffs' interest in the community. *Calvit* v. *Mulhollan.—Re-hearing*, 266

6. Stock in a bank here secured on real estate, acquired before the removal of the spouses from this State, having the same *situs* with the immoveable on which it is a charge, and being transferrable only on the books of the bank situated here, whether considered as a moveable according to art. 466 of the Civil Code, or an immoveable under art. 462, forms part of the community property. *Succession of Packwood*, 334.

7. Where a husband and wife, married in another State, remove into this, the laws establishing and regulating the matrimonial community of gains will operate upon the property acquired during their residence here: and where they subsequently remove from this State, its laws will cease to operate upon property afterwards acquired here, such acquisitions becoming the the property of the party to whom they may belong according to the law of the new domicil of the spouses. *Ibid.*

8. The removal of the husband and wife into another State, does not vest in either spouse any distinct or separate title to one undivided half of the community property previously acquired here. So long as the marriage continues, the husband retains his power over the property of the community; he has a right to enjoy its fruits; it is liable for his debts contracted after as well as before the change of domicil; and he may sell it, if the sale be not fraudulent. On the death of the wife, one-half of the property still in existence, acquired during the residence of the spouses here, will vest in the heirs of the wife, subject to the payment of the debts contracted by the husband during the marriage. *Ibid.*

9. The property found at the dissolution of the marriage, constitutes the body of *acquests* and gains. *Ibid.*

10. To annul a sale of community property made by a husband, it is not enough, under art. 2373 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife. *Ibid.*

11. A husband and wife, between whom a community of *acquests* existed in this State, having acquired a plantation which formed part of the community property, subsequently removed into a State where the common law prevails. After their removal, the husband and wife sold the plantation. After the death of the wife, the husband and the purchaser cancelled the sale; the notes given for the price were returned to the purchaser, and the plantation re-conveyed to the husband. The husband having qualified in this State as executor of his wife, on an opposition to an account filed by him, made by the heirs of the wife, claiming that the retrocession should enure to the benefit of the community, or that the husband should account to the heirs of the wife for one-half of the price: *Held*, that on the retrocession, the title vested in the husband alone; and that if the wife had any interest in the notes, the executor is not bound to account for it here, as both spouses lived in another State at the time, and the fund does not belong to the community. *Ibid.*

12. Where real estate belonging to a community existing between a husband and wife, is sold by the husband, and the spouses afterwards remove from

this State, and the wife dies out of this State, the husband will not be accountable here for the price, if not existing here at the death of the wife. *Per Curiam:* The husband is no more accountable for that transaction than for the price of any other property sold by him before the dissolution of the community. *Ibid.*

13. Real property inherited by one of the spouses during the marriage, and existing in kind at the time of its dissolution, should not be included in the settlement of the community between the survivor and the heirs of the deceased spouse; it must be withdrawn by the owner in the condition in which it existed at the dissolution of the marriage. If built upon, or improved during the marriage, the owner of the soil has a right to keep the improvements on accounting to the other spouse for one-half of the enhanced value of the property. C. C. 2377. He has no right to abandon the soil to the other spouse, nor to the community, and to claim in its place the amount of a previous valuation of it, thereby prejudicing the rights of others. *Mercier* v. *Canonge*, 385.

14. Where after the dissolution of the community, the surviving spouse borrows a sum on the pledge of bank stock belonging to it, he should be charged in the settlement of the community, only with the sum borrowed, and not with the whole amount of the stock, which continues the property of the community. *Ibid.*

15. Where after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333. *Ibid.*

16. In the settlement of the community, dividends on stock belonging to it received by the surviving spouse after its dissolution, must be placed to its credit; and it must be debited with the amount of any interest on its debts paid by the survivor. *Ibid.*

17. Property purchased under the authority of the husband in the name of a wife, between whom and her husband there existed a community of *acquests*, but not paid for with her paraphernal funds under her separate administration, nor received by her as a *dation en payement* from a debtor of a separate and paraphernal claim, belongs to the community. The contract is as binding on the community as if made by the husband, and the wife neither becomes the owner of the property nor incurs any personal responsibility therefor, (C. C. 2371, 2372, 2375, 2378, 2379, 2393); nor could she in any manner bind herself with her husband for the payment of the price. C. C. 2412. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.

III. *Contracts of Married Women.*

18. Where a married woman, under the authorization of her husband, sells a tract of land, retaining a mortgage to secure the payment of the price, and by the same act, without any pecuniary consideration personal to her, agrees to give priority to a mortgage to be executed by her vendee, in favor of a third person, to secure the payment of a sum, a part of which was a debt due to such third person by her husband, the purpose of the contract being to render the wife, in effect, a surety for the husband, his authorization will not remove the disability created by art. 2412 of the Civil Code, nor render the contract, so far as it accords a priority to the second mortgage, valid. C. C. 1784. *Cuny* v. *Brown*, 82.

19. Any obligation contracted by a married woman, by which she subjects her property, though but to a certain extent, to be seized and sold for the benefit of a creditor of her husband, is prohibited, though her obligation be not co-extensive with that of her husannd, and though she be not personally bound. C. C. 1784, 2412. *Ibid.*

20. A married woman, under the authorization of her husband, sold a tract of land, retaining a mortgage to secure the price, and agreed, without any pecuniary consideration personal to herself, to give priority to a mortgage to be executed by her vendee in favor of a third person, to secure a sum, part of which consisted of a debt due to the latter from her husband. In an action by the wife to rescind so much of the contract as gives priority to the second mortgage over her own: *Held*, that as the husband could not authorize his wife to make a contract by which she bound her property for his debt, the contract must be rescinded, so far as it accords a priority to the second mortgage, though the debt due by the husband, formed but a part of the sum for which the second mortgage was executed. *Per Curiam:* The consent of the husband cannot be divided: *non constat*, that he would have assented to the gratuitous surrender of his wife's right but upon condition of securing the debt due by him, nor that the second mortgagee would have accepted the mortgage without a priority as to the whole sum.

Ibid.—Re-hearing, 86.

21. The 27th section of the statute of 1st April, 1835, incorporating the Exchange and Banking Company of New Orleans, authorizing a "wife to bind herself jointly and *in solido* with her husband in all hypothecary contracts or obligations entered into by him in favor of that institution," does not empower a wife to bind herself with her husband, for the price of stock of the company, purchased in her name during the existence of the matrimonial community. *Per Curiam:* The provision in favor of the bank being in derogation of the general rule prescribed by art. 2412 of the Civil Code, must be strictly construed. It cannot be extended to cases not clearly within its purview.

Commissioners of Exchange and Banking Company v. *Bein*, 578.

ILLEGITIMATE CHILDREN.

The acknowledgment of an illegitimate child made by the parent in the regis-

ter of its baptism was sufficient, under the Code of 1808, book 1, tit. 7, art. 25. So under the present Code, art. 221.

Balot y Ripoll v. *Morina*, 552.

See SUCCESSIONS, 37, 38, 39, 40, 41.

INDICTMENT.

See SUMMARY PROCEEDINGS, 1.

INJUNCTION.

1. Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Williams v. *Planters Bank*, 125.

2. Where the value of property seized under a *fi. fa.* from a Parish Court, exceeds the sum to which the jurisdiction of the court is limited, an injunction may be obtained, by one claiming to be the owner of the property, from a District Court. The circumstances of the case make it a necessary exception to the provisions of arts. 397, 617, 629 of the Code of Practice.

Chapelle v. *Lemane*, 519.

3. A District Court cannot enjoin the execution of a judgment rendered by a Probate Court. *Nolan* v. *Babin*, 531.

INSOLVENCY.

1. A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 285,) but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance. *Buard* v. *Lémée*, 243.

2. Defendants sued by the transferree of a note made by them, but not negotiable, pleaded their discharge under the insolvent laws. The schedule of the insolvents showed that the payee of the note was placed on it as a creditor for a sum exceeding the amount of the note. It was not proved that the note had been transferred to plaintiff, nor that defendants were notified of the transfer previously to filing their *bilan*. *Held*, that it was for the plaintiff to show that the amount for which the payee was placed on the *bilan* as a creditor did not include the note sued on; and there being no allegation that the defendants have acquired any property since their discharge, that there must be a judgment of nonsuit.

Vauquelin v. *Platet*, 381.

3. A creditor, whose claim has not been placed on the schedule of an insolvent, is not affected by the proceedings. *Ibid.*

4. Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property. *Collier* v. *His Creditors*, 398.

5. An authority to sell real property and to apply the proceeds in a particular way, unexecuted at the time of a *cessio bonorum* by the principal, is revoked thereby. *Barrett* v. *His Creditors*, 474.

6. A slave belonging to plaintiffs who were minors, having been sold by their father, another slave was purchased with the proceeds. The father having made a surrender of his property, the plaintiffs, by their under-tutor, sued to recover the slave so purchased: *Held*, That the title of the slave, which vested in the insolvent, passed to his creditors: and that, admitting that minors, where their property has been illegally sold, or where a purchase has been made with their funds, can claim either the money or the property, yet they can make this election only after coming of age, such election being equivalent to alienation of their estate or to a purchase of property. *Calmes* v. *Carruth.—Re-hearing*, 663.

See HUSBAND AND WIFE, 15. MINOR, 6.

INTEREST.

1. A stipulation in a note given for the price of property sold on a credit, that, if not paid at maturity, the amount for which the note was given shall bear the highest conventional interest from the date of the note till paid, is usurious. *Succession of Stafford*, 178.

2. A loan made in bank stock estimated above its specie value, and in depreciated bank notes at par, payable by the borrower in specie, where the sum stipulated to be paid by the borrower exceeds the actual specie value of the stock and notes, with the highest rate of conventional interest, is usurious. Proof that the borrower could pass off the stock and notes at the value fixed by the contract, in payment of debts due by him, does not render the transaction the less usurious. *Coxe* v. *Rowley*, 273.

3. Where, in sales of stock or depreciated currency, there is ground to suspect a disguised usurious loan, the mere form of the contract will be disregarded. The court will look to its essence, and endeavor to ascertain the true intent of the parties. Where usurious interest has been paid, it cannot be reclaimed. *Ibid.*

4. By the laws of Mississippi (stat. 25 June, 1822,) where an usurious rate of interest has been stipulated, the lender can recover only the principal. *Ibid.*

5. The holder of a note given by the purchaser for the price of property, secured by mortgage on other property, cannot recover interest from maturity, where the note was not protested. The mortgagee of property producing fruits is not entitled to legal interest, without a demand or an agreement to that effect, as an equivalent for the fruits received from the property. *Aliter*, as to the vendee of such property. C. C. 2531. *Collier* v. *His Creditors*, 399.

6. Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property. *Ibid.*

7. In an action to recover the proceeds of a note deposited as collateral security, plaintiff will be entitled to interest on the amount of the note from maturity, where the note was protested at maturity, and defendant acknowledged the receipt of the amount due on it. *Escurieux* v. *Chapdu*, 520.

INTERPRETATION.

In the interpretation of contracts the common intent of the parties, rather than the literal sense of the terms, should be sought; and where the intent is doubtful the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation. C. C. 1951. *Marcotte* v. *Coco*, 167.

See CONTRACTS, 11. HUSBAND AND WIFE, 2, 21.

INTERROGATORIES TO THIRD PERSONS UNDER A FI. FA.

See EVIDENCE, 42, 43.

JUDGMENT.

1. A judgment of nonsuit having been set aside, and a new trial allowed, at the succeeding term after the new trial had, and a judgment entered on the minutes for the plaintiff, the judge by mistake signed the judgment of nonsuit, which had been transcribed on the petition: *Held*, that the judgment of nonsuit, having been set aside within the time prescribed by law, was a nullity, and could not be reinstated by the subsequent inadvertent signature of the judge. *Hatch* v. *English*, 135.

2. A judgment of nonsuit will not support a plea of *res judicata*. *Rutledge* v. *Barnes*, 160.

3. The exception of *res judicata* can be pleaded for the first time before the Supreme Court, only where the facts necessary to sustain it appear from the record. C. P. 902. *Carpenter* v. *Beatty*, 540.

4. A judgment overruling, as coming too late, an exception by the defendant to the legality of an attachment, has the force of *res judicata* as to the surety in the attachment bond. *Irish* v. *Wright.—Re-hearing*, 571.

JUDGMENT BY DEFAULT.

1. Where one to whom interrogatories have been propounded under the 13th sect. of the act of 20 March, 1839, fails to answer within the delay fixed, such failure will, as in the case of a garnishee, be considered as a confession of his having property belonging to the debtor sufficient to satisfy the demand, and a final judgment may be rendered against him, on motion, without notice, for the amount of the demand, with interest and costs. C. P. 263. *Aliter*, where the party interrogated denies being indebted, and it

is attempted to disprove his answers; in such a case an issue is joined, and the party must have an opportunity of being heard before he can be condemned. *Poole* v. *Brooks*, 484.

2. A judgment by default taken on the fifth day after service of citation on the defendant, and afterwards confirmed, is illegal and null. C. P. 180, 310.
Arthur v. *Cochran*, 484.

JURISDICTION.

See COURTS. STATE, JURISDICTION OF.

JURY.

1. The jury are judges both of the law and the facts (C. P. 520); and though the judge must abstain from saying anything about the facts, or even recapitulating them so as to exercise any influence on the decision of the jury, it is his duty to charge them as to the law applicable to the case. C. P. 516, 517. *Spofford* v. *Pemberton*, 162.
2. Where the evidence is contradictory, and its effect depends in a great degree upon the credibility of the witnesses, a jury are the best judges of the weight to which it is entitled; and their verdict will not be disturbed, unless manifestly wrong. *Edwards* v. *Burroughs*, 171.
3. The verdict of a jury must be set aside when evidently wrong.
Marigny v. *Union Bank*, 283.
4. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.
Turner v. *Walsh*, 383.
5. One sued as the maker of a note is entitled to a trial by jury, only where he has made the affidavit required by sect. 24 of the act of 20 March, 1839.
Hennen v. *Bourgeat*, 522.

LAFAYETTE, CITY OF.

The act of 22 March, 1843, ch. 66, which provides (sect. 5,) that the privilege granted to the city of Lafayette on property within its limits, for the proportion to which the owner is liable for any work done, or for taxes assessed thereon, shall only exist where an account thereof, duly certified, has been recorded in the office of the Recorder of Mortgages of the parish of Jefferson, does not apply to work done or taxes assessed before the date of that act; the right of the city to recover the cost of such work, or such taxes, must be governed by sects. 6 and 8 of the act of 12 March, 1836. The act of 1836, gives a privilege only for work done, and not for taxes; no law previous to the act of 1843 gave any privilege for the latter.
Mechanics and Traders Bank v. *Richardson*, 596.

LETTING AND HIRING.

1. A contract by which one party grants to the other the use of a building for a certain period, in consideration of a sum paid in cash, and the execution of notes by the latter for a further sum, payable at different periods, the written instrument describing it as one of lease, is not a contract of sale, but of lease.

Orleans Theatre Insurance Company v. *Lafferanderie*, 472.

2. Where a lessor, in an action for rent in arrear, causes the lease to be sold without observing the forms required by law, the lessee being thereby divested of possession by the tortious act of the lessor, will be released from any liability for rent accruing after the seizure. *Ibid.*

LEVÉE.

Where the police regulations of a parish require that notice in writing shall be given to resident proprietors personally, or at their domicil, of all work required to be done on any levée, the land on which such work is to be done, if the property of a resident proprietor, cannot be made liable, by a summary proceeding *in rem*, for the costs of such work, though executed in pursuance of an adjudication by the overseer of roads and levées, without proof of written notice, served personally, or at the domicil of the proprietor. The certificate of the inspector of roads and levées is not conclusive proof of notice, as against the proprietor; and parol evidence is admissible to prove that no sufficient notice was given. *Hamilton* v. *Michel*, 598.

MINOR.

1. A succession cannot be accepted for minor heirs, but with the benefit of inventory; and no portion of the estate can come into their possession, until it has been administered upon in due course of law, when, whatever may remain after the payment of the debts, will fall under the administration of their tutor. C. C. 1051. *Arthur* v. *Cochran*, 41.

2. Tutors of minor heirs are not entitled, *ex officio*, to administer successions accruing to their wards. They may claim the administration, where there are no beneficiary heirs of age, in preference to any other person; but they must give security and qualify as other administrators. C. C. 1034, 1037. *Ibid.*

3. Persons holding claims against a succession cannot sue the tutor of the minor heirs, and obtain a judgment against him for debts due by the deceased. Where no executor or administrator has qualified, they must provoke the appointment of an administrator, against whom, as the legal representative of the estate, they may institute suit. C. C. 1031 to 1060. C. P. 974 to 996. *Ibid.*

4. No tutorship exists during the marriage over the children born of it. C. C. 234. While the marriage exists, the father is the administrator of the estate of his minor children, and he is accountable for the property and re-

venues of the estate, the use of which he is not entitled to by law, and for the property only of such as the law gives him the usufruct of; his administration ceasing at the majority or emancipation of the children. C. C. 267, 239, 240. But the child has no legal mortgage or privilege on the property of the father as a security for his faithful administration during the marriage. C. C. 552, 553, 555, 3280 to 3288. *Cleaveland* v. *Sprowl*, 172.

5. Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age. *Mitchell* v. *Cooley*, 370.

6. Where a slave, inherited by minors from the succession of their mother, has been illegally sold by their natural tutor, they will not be allowed to ratify the sale, and claim the price from their tutor to the prejudice of other creditors of the latter. Their recourse is against the purchaser for the recovery of the slave. *Mercier* v. *Canonge*, 385.

7. Where, after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333. *Ibid.*

8. Defendant, the natural tutor of his minor children, having rendered an account of his administration of the estate of his deceased wife, with whom there existed a community of *acquests*, charged himself with the revenues of the minors derived from property inherited from their mother and administered by him as tutor, but omitted to credit himself with the expenditures incurred subsequently to the dissolution of the community for their maintenance and education. It was proved, that the community and the surviving husband were insolvent, and that the latter had no property at the death of the wife. The property of the minors was sufficient to provide for their support and education. On an opposition by plaintiffs, who had obtained a judgment against defendant, their former tutor, for a balance due to them: *Held*, that defendant, as natural tutor of his children, was bound to account for the revenues of their property, after deducting the expenses of their support and education, according to their means and condition in life; that the alimony due from ascendants to descendants being due only in proportion to the wants of the one and the circumstances of the other, none was due by defendant to his children, (C. C. 245, 246, 247); and that the chil-

dren having an income sufficient for their support and education, plaintiffs, who were interested in the settlement of the tutorship, had a right to require that the support and education of the minors should be paid for out of the revenues of their property. *Ibid.*

9. A tutor being bound to procure medical assistance, when necessary, for the minor, the receipt of a physician for the amount of his fees for such services paid by the tutor, and admitted without opposition, is a sufficient voucher to entitle the latter to credit for the amount. *Per Curiam:* A tutor is not bound to procure evidence of the necessity for such services, where the amount paid is not large, and nothing authorizes the presumption that the payment was improperly made. *Richard* v. *Blanchard*, 524.

10. A natural tutor, though the law does not require him to be confirmed or appointed by the judge, must, like other tutors, take an oath before he can act as such. C. P. 949. And where an action has been commenced by a natural tutor before taking such oath, it will be dismissed on an exception to his want of authority. *Mitchell* v. *Cooley*, 636.

11. A slave belonging to plaintiffs who were minors having been sold by their father, another slave was purchased with the proceeds. The father having made a surrender of his property, the plaintiffs, by their under-tutor, sued to recover the slave so purchased: *Held*, that the title of the slave, which vested in the insolvent, passed to his creditors: and that, admitting that minors, where their property has been illegally sold, or where a purchase has been made with their funds, can claim either the money or the property, yet they can make this election only after coming of age, such election being equivalent to an alienation of their estate or to a purchase of property.

Calmes v. *Carruth.—Re-hearing*, 663.

See SUCCESSIONS, 28.

MORTGAGE.

1. The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death. *Buard* v. *Lémée*, 243.

2. A., for the accommodation of B., drew a bill on the latter, in favor of C., which was accepted, but protested for non-payment by the payee. After the protest, B., to secure A. from any loss in consequence of his failure to pay the bill, gave the latter a mortgage on a plantation and slaves. C., having afterwards recovered judgment against A. and B. for the amount of the bill, assigned the judgment to D., who was subsequently, in consideration of releasing A., subrogated by the latter to his mortgage on the plantation and slaves. It was not proved that A. paid anything as drawer on the bill: *Held*, that the mortgage in favor of A., being intended only to indemnify him against any loss in consequence of the non-payment of the bill, and not to secure the payment of the bill itself, the contract was personal to A.; that the event, with a view to which it was executed not having occurred, the mortgage never took effect; and that consequently D. acquired nothing by the transfer of the rights of A. *Collier* v. *His Creditors*, 398.

8. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Ibid.*

4. Where the purchaser of property sold under execution, subject to a special mortgage given to secure the payment of a note, retains the amount of the mortgage as a part of the price, and subsequently makes a partial payment to the mortgagee, the payment will interrupt prescription both as to the original debtor and the purchaser, being made in discharge of the former, and with his implied assent. *Ibid.*

5. The holder of a note given by the purchaser for the price of property, secured by mortgage on other property, cannot recover interest from maturity, where the note was not protested. The mortgagee of property producing fruits is not entitled to legal interest, without a demand or an agreement to that effect, as an equivalent for the fruits received from the property. *Aliter*, as to the vendee of such property. C. C. 2531. *Ibid.*

6. Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property. *Ibid.*

7. Where one of the heirs mortgages his undivided share in certain immoveables belonging to the succession, and they are subsequently sold under an order of the Probate Court, for the purposes of liquidating and partitioning the succession, the proceeds of the sale of the share so mortgaged will stand in place of the property, and be subject in the hands of the administrator, to the claims of the mortgage creditor, as if no sale had been made. Act 27 March, 1843, s. 2. *Succession of Pigneguy*, 450.

See MINOR, 4. PRIVILEGE, 3.

MOVEABLES.

Personal property has no other *situs* than the domicil of the owner. *Succession of Packwood.—Re-hearing*, 366.

NEW ORLEANS GAS LIGHT AND BANKING COMPANY.

1. The act of 1 April, 1835, incorporating the New Orleans Gas Light and Banking Company, having conceded to the company the exclusive privilege of vending gas in the cities of New Orleans and Lafayette (§ 36,)

during a certain period, the company is bound to supply gas to all persons who may call for it, on their paying or offering to pay therefor. The company have no right to require the owner of a building to pay an amount due by a former owner for gas, as the condition of supplying him.

Gas Light and Banking Company v. *Paulding*, 378.

2. A promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own use, and in consequence of a threat, by the company having the exclusive privilege of vending gas, that unless the amount were paid, no gas should be supplied, is void. C. C. 1853. *Ibid.*

NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

Plaintiff, who had been appointed a port warden in place of defendant, was enjoined from exercising the functions of the office, on the ground that his appointment was illegal. Pending the action, defendant discharged the duties and received the fees of the office. The injunction was dissolved, and plaintiff declared to have been legally appointed. Plaintiff did not take the oath required to qualify him to act as a port warden till after the dissolution of the injunction. In an action on the injunction bond, for damages: *Held*, that plaintiff had no right to act as a port warden until qualified by taking the oath of office; that the injunction did not restrain him from taking the oath; and that defendant, having a right to act until plaintiff had qualified, no damages can be recovered by the latter. *Thompson* v. *Nicholson*, 326.

NONSUIT.

Where an attorney is appointed to represent absent defendants, and on the same day an answer is filed by him and the suit dismissed, the proceedings are irregular, and, on motion by plaintiff, the suit must be reinstated. *Per Curiam:* As soon as an answer has been filed, the clerk must place the case on the docket, that it may be called in its turn and a day fixed for its trial (C. P. 463); and the court can order a nonsuit without the consent of the plaintiff, only where the case has been set for trial, and the plaintiff fails to appear, personally or by attorney, on the day fixed. *Ibid.* 536.

Walton v. *Commercial and Railroad Bank*, 99.

OFFENCES AND QUASI-OFFENCES.

1. Where slaves have been seized under a *fi. fa.*, and the sheriff, with the consent of the plaintiff in execution, leaves them with the debtor until the day of sale, they will be considered as in the legal custody of the sheriff; and one proved to have aided the debtor in removing them beyond the limits of the state, with a view to defraud his creditors, will be responsible to the latter to the extent of the injury they may sustain in consequence, and the full value of the slaves will be the measure of damages, if the debt amounts

to so much. C. C. 2294, 2295, 2304. Testimony that will satisfy a jury of the guilt of the defendant is sufficient to maintain the action; and every fact proved, calculated to produce this conviction, should be considered, in coming to a conclusion as to his knowledge of the fraud.

Smith v. *Berwick*, 20.

2. Every man is responsible for injury done to another, though occasioned by negligence or imprudence. C. C. 2295. *Ibid.*

3. An action may be maintained by a creditor against a third person for the injury done to him by the latter, in aiding his debtor to remove his property beyond the limits of the state, though a suit be pending, by the creditors against the debtor, in the country to which the property was removed, for the purpose of subjecting it to the payment of the debt. But the defendant, on proving that any thing has been made in the action against the debtor, will be entitled to have the amount deducted from the sum for which he would otherwise be liable. *Ibid.*

4. The trouble and expense to which a party is subjected in establishing his title to property of which the defendant attempted fraudulently to dispossess him, form a good ground for estimating the damages he is entitled to recover. *Copley* v. *Berry*, 79.

5. Damages for an illegal arrest, may be recovered under art. 2294 of the Civil Code, which declares that every man shall be bound to repair any damage done, by his fault, to another. *Spofford* v. *Pemberton*, 162.

6. Plaintiff, who had been appointed a port warden in place of defendant, was enjoined from exercising the functions of the office, on the ground that his appointment was illegal. Pending the action, defendant discharged the duties and received the fees of the office. The injunction was dissolved, and the plaintiff declared to have been legally appointed. Plaintiff did not take the oath required to qualify him to act as a port warden till after the dissolution of the injunction. In an action on the injunction bond, for damages: *Held*, that plaintiff had no right to act as a port warden until qualified by taking the oath of office; that the injunction did not restrain him from taking the oath; and that defendant, having a right to act until plaintiff had qualified, no damages can be recovered by the latter.

Thompson v. *Nicholson*, 326.

7. The owner of land illegally taken for public use by the authorities of a city, may recover its value at the time it was taken, in an action for damages. On the receipt of the damages the property will cease to belong to the plaintiff. *Lawrence* v. *Second Municipality of New Orleans*, 453.

8. Where a lessor, in an action for rent in arrear, causes the lease to be sold without observing the forms required by law, the lessee being thereby divested of possession by the tortious act of the lessor, will be released from any liability for rent accruing after the seizure.

Orleans Theatre Insurance Company v. *Lafferanderie*, 472.

9. One whose property has been seized and sold, after notice of his title, un-

der an execution against a third person, may recover not only the value of the property, but damages for the illegal seizure and sale.

Dutton v. *Rousseau*, 534.

10. An inspector of elections who has illegally and maliciously prevented one from voting, will be responsible to the latter in damages.

Bridge v. *Oakey*, 638.

11. Plaintiff having commenced an action against a city corporation for damages for oppressive and illegal proceedings on the part of the President and Council, in which she alleged that the latter, though acting officially, were really actuated by private interest and malice, obtained an injunction restraining them from entering upon and committing any trespass on her property. Defendants disregarded the injunction, and demolished a portion of a building forming part of the property. The jury returned a verdict in favor of plaintiff for an amount greatly exceeding the actual damage to the property, and there was judgment accordingly. On appeal: *Held*, that the acts of the President and Council having been alleged to be wilful and malicious, plaintiff cannot recover vindictive damages against the corporation, but only an indemnity for the loss actually sustained by her.

McGary v. *City of Lafayette.—Re-hearing*, 674.

See SEQUESTRATION.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, I.

PARTNERSHIP.

1. An unincorporated association of individuals formed for the purpose of dealing in exchange, is a commercial partnership within the terms of art. 2795 of the Civil Code; and the members are responsible, *in solido*, for the debts of the society. *English* v. *Wall*, 132.

2. The partners in a particular partnership are not bound *in solido*, for the debts of the firm, but each for his share only, calculated in proportion to the number of the partners (C. C. 2844); nor can one partner bind the rest, unless empowered to do so specially, or by the articles of partnership. C. C. 2843. *Buard* v. *Lémée*, 243.

3. A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 285,) but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance. *Ibid.*

4. After the dissolution of a partnership none of the members can bind the rest, nor the partnership, for the payment of a debt which has been prescribed. *Ibid.*

5. A transfer of a judgment belonging to a partnership in a state of liquida-

tion, made by an agent authorized to settle its affairs, but not expressly empowered to sell or transfer such property, must be declared void, unless it be shown that the transfer, being for the settlement, or payment of a partnership debt, was for the benefit of the partnership, and necessary to its liquidation, and that due notice thereof was given to the judgment debtor.

Smith v. *McMicken*, 653.

PARTIES.

See APPEAL, IV. EVIDENCE, XIV. PLEADING, I.

PAYMENT.

1. Where a creditor receives from his debtor a draft on a third person, as collateral security, the proceeds to be applied to the payment of his debt, he acts, so long as he holds the draft, as the agent of his debtor, and is responsible not only for unfaithfulness, but for faults or neglect; (C. C. 2971, 2972;) and where, through the neglect of the creditor, in giving incorrect instructions to the notary by whom the draft was protested, or in not furnishing him with the means of obtaining correct information as to the residence of the endorser, the latter, the only solvent party to the bill, is discharged, the debtor will be entitled to credit for the amount of the bill.

Cammack v. *Priestly*, 423.

2. A tax collector cannot be required to receive in payment of taxes, *coupons* or warrants for the semi-annual interest due on certain bonds of the State, executed in favor of a bank, though the State be bound to pay the interest on the bonds, where the party taxed does not show himself to be the owner of the bonds, and the *coupons* or warrants purport to have been issued, and to be payable by the bank, and the laws authorizing the issuing of the bonds in favor of the bank, give it no power to issue such *coupons* or warrants in the name of the State. *Roman* v. *Ory*, 517.

3. A husband has authority to receive whatever may be due to his wife on account of her paraphernal property, when such property is not proved to be under her sole and separate administration; and a payment to him will discharge the debtor. C. C. 2362. *Richard* v. *Blanchard*, 524.

PETITORY ACTION.

See EVIDENCE, 54, 55. PLEADING, 5, 6.

PLEADING.

I. *Parties to Actions.*
II. *Actions, where to be brought.*
III. *Petition and Amendments thereto.*
IV. *Exceptions and Answer.*
V. *Reconvention.*
VI. *Interrogatories to a Party.*

VII. *Proceedings against an Attorney to Cancel his License.*
VIII. *Proceedings for the Settlement of Successions.*

I. *Parties to Actions.*

1. An action may be maintained against an absentee, though not personally cited, and though no property of his have been attached, where a curator, *ad hoc*, has been appointed to represent him. *Coply* v. *Berry*, 79.
2. The provision of art. 43 of the Code of Practice, that a petitory action must be brought against the person in actual possession of the immoveable does not contemplate that the person sued should have the right of possession. It is enough that he be the actual occupant.

Dreux v. *Kennedy*, 489.

3. Plaintiffs having instituted a petitory action against defendants to recover lands alleged to be in their possession, the latter excepted to answering the petition, and prayed for its dismissal, averring that the property is in the possession of the United States, a branch Mint having been erected thereon; that they are merely officers of the Mint, and are not in possession of the premises, and have no authority to represent the United States; and that this action is an attempt to effect indirectly what plaintiffs could not do directly: *Held*, that the exception should be overruled. *Per Curiam:* Where the party in possession, sued in a petitory action, points out the owner under whom he holds, he is bound to defend the action, if such owner do not live within the State or is not represented therein, or if such proprietor, lessor or principal be the United States, against whom no direct action can be brought. *Ibid.*
4. Two distinct actions having been commenced by different plaintiffs against the defendant, attachments were levied at the same time on the same property, which were released on the execution of a single bond for the two cases, conditioned that if said defendants shall satisfy such judgments as may be rendered against them in the suits pending, the said obligations shall be void, otherwise remain in full force, &c. The claim of each plaintiff exceeded the amount of the bond, which was silent as to their respective shares in it. On a rule by one of the plaintiffs against the sureties on the bond to show cause why they should not satisfy a judgment obtained by him, and exception by the sureties that plaintiff, being a joint obligee, could not recover against them without joining his co-obligee; *Held*, that the bond containing distinct obligations to perform different things in favor of different persons, each obligee has a distinct and separate remedy, (C. C. 2074, 2076); but that where one plaintiff proceeds against the sureties, before any decision on the claim of the other, he can recover only one-half of the amount of the bond, reserving his right to recover the balance in case the plaintiff in the other action shall be defeated. *Irish* v. *Wright*, 563.
5. Under the statutes of 9 March, 1827, and 17 March, 1828, authorizing certain inhabitants of the parish of Iberville to raise a sum of money by lottery, a majority of the commissioners are empowered to sue, for the be-

ne fit of the inhabitants, for money received by one of the commissioners, and converted to his own use. In such an action the commissioners cannot be required to name the inhabitants represented by them; nor will the objection that the plaintiffs had not given bond, as required by those statutes, avail a defendant who had also failed to give bond as a commissioner, and withheld money received by him. *Potts* v. *Camp*, 646.

See BANK, 5.

II. *Actions, Where to be brought.*

6. Where a party sues to annul a conveyance of land which he alleges was fraudulently obtained, to his prejudice as a previous purchaser from the same vendors, to the knowledge of one of the defendants who acted as agent of the other, and prays to be declared the owner of the land, and for damages, the action will not be dismissed on an exception that it is brought in a parish which was neither the residence of the defendants, nor that in which the land was situated. *Per Curiam:* The action is rather a personal one, to obtain redress for a fraud, the effect of which was to deprive the plaintiff of a right previously acquired, than a real one to recover the land itself in the adverse possession of defendants; and though the annulling of the contract would confirm, as against the defendants, plaintiff's title to the land, the gist of the action is the cancelling of a contract.
Copley v. *Berry*, 79.

7. Courts of probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam:* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate. *Hemken* v. *Ludewig*, 188.

8. A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together; and a probate court is without jurisdiction as to the latter. *Ibid.*

III. *Petition and Amendments thereto.*

9. A petition signed by the plaintiff's attorneys, in their own names, without describing themselves as attorneys for the plaintiff, is sufficient. C. P. 172.
Merrell v. *Lattimore*, 138.

10. Where a petition is excepted to for the omission of a mere matter of form, the plaintiff may amend *instanter*, and the defendant cannot require time to

answer such amendment, nor require that the amended petition should be served upon him. *Ibid.*

11. Amendments to a petition may be allowed as well before as after issue joined. *Ibid.*

12. Where plaintiff sues on a note as having been transferred to him, and the note, which is annexed to and prayed to be taken as a part of the petition, shows that it was transferred to the plaintiff and another person, and there is no evidence that plaintiff afterwards acquired the whole interest in it, the variance between the *allegata* and *probata* will be fatal.

Taylor v. *Normand*, 240.

13. A plaintiff may introduce any evidence necessary to disprove or rebut the allegations made by the defendant in his answer, though the facts offered to be proved by the former were not alleged in the petition. No replication being allowed, all new facts alleged in the answer are considered as denied. C. P. 329. *Riley* v. *Wilcox*, 648.

14. Where, in an action for wages as an overseer, plaintiff alleges that he was engaged for one year from the first of January, and that he performed the duties of an overseer from that day, he will not be allowed to show that, although he was engaged from that day it was understood between the contracting parties, that he was not to take full charge of the plantation till the 6th of the month. If the contract was subject to such a condition, it should have been alleged. *Ibid.*

See 8, *supra.*

IV. *Exceptions and Answer.*

15. After the plea of the general issue, and the admission of evidence, without objection, going to show the real character of the transaction, it is too late to object that the petition sets up contradictory grounds of action, and prays for remedies inconsistent with each other. *Cuny* v. *Brown*, 82.

16. Though a creditor cannot treat a conveyance of real estate by his debtor, alleged to be fraudulent, as null, and seize under a *fi. fa.* the property in the hands of his vendee; yet if the latter do not enjoin the proceedings, but permits the sheriff to seize and sell the property as still belonging to his vendor, and afterwards sues the purchaser at the sheriff's sale to annul the sale and cause himself to be declared the owner of the property, the creditor, cited in warranty, may plead by way of exception, whatever he might have urged in a direct action to annul the first sale.

Fisher v. *Moore*, 95.

17. All exceptions to form are considered as waived where the parties proceed to trial on the merits, without requiring any decision on the exceptions. *St. Romain* v. *Robeson*, 194.

18. Plaintiff having sued defendants, a banking company, on notes issued by them, certain persons intervened alleging that defendants had assigned to them their whole property for the benefit of their creditors; and plaintiff, in answer to the petition of intervention, averred that the assignment was

illegal. The intervenors having pleaded the prescription of one year against revocatory actions: *Held*, that the assignees, by seeking to avail themselves of the assignment by way of intervention, became thereby plaintiffs or actors, and that the illegality being set up by way of exception, prescription cannot be pleaded, under the rule *Quæ temporalia*, &c.

Marshall v. *Grand Gulf Railroad and Banking Company*, 196.

19. Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception. *Ibid.*

20. Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but on the exception being overruled pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court.

Grove v. *Harvey—Re-hearing*, 226.

21. Whenever a remedy may be sought by action, the party entitled thereto, may avail himself of it by way of exception. C. C. 2042. C. P. 20.

Orleans Theatre Insurance Company v. *Lafferanderie*, 472.

22. Plaintiffs, commissioners for the liquidation of a bank, having sued the cashier and his sureties in his official bond, for damages for misconduct of the cashier, instituted, pending the first suit, a second action against the cashier, president, and directors for malfeasance. The demand in the first case was limited to the amount of the official bond of the cashier. On an exception by the cashier of *lis pendens*: *Held*, that the action cannot be divided, and a part of the damages sued for in one case, and a part in the other; and that the cause of action being the same, though the amounts demanded are not, the exception should be sustained. C. P. 335.

Hemken v. *Ludewig*, 188.

V. *Reconvention.*

23. Where the holder of a note, with whom a draft had been deposited by the debtor, as collateral security, becomes liable to the latter for the amount in consequence of his neglect to protest the draft, the damages sustained by the debtor may be pleaded in reconvention to an action on the note by the holder, (C. P. 375,) or by the syndic of his creditors, where the holder had become liable by his neglect to protest the draft before his declared insolvency. *Cammack* v. *Priestly*, 423.

24. It is not necessary that a demand pleaded in reconvention should, in all cases, be liquidated. *Ibid.*

25. One who has received money as a commissioner under a statute providing for the raising and disbursement of a certain sum in the improvement of a portion of a parish, and has expended a part thereof for the purposes contemplated by the act, though without authority from the board, under whose direction the money was to be disbursed, and without complying with other formalities prescribed by the act, may, in an action against him for the amount received, claim an allowance for the value of the work paid for by

him. He cannot be forced to resort to a separate action to obtain the credits to which he is equitably entitled. *Potts* v. *Camp*, 646.

VI. *Interrogatories to a Party.*

26. Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient. *Commercial Bank* v. *Guice*, 181.

VII. *Proceedings against an Attorney to Cancel his License.*

27. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.

Turner v *Walsh*, 383.

VIII. *Proceedings for the Settlement of Successions.*

28. Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case.

Succession of Blakey, 155.

29. One not shown to be a creditor of a succession cannot oppose the allowance of claims set up by others. *Succession of Floyd*, 197.

30. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. Such proceedings cannot prejudice their claims against the estate.

Succession of Thomas, 215.

31. A widow, who has accepted the community, is entitled to one-half of the balance found due after a full administration and the payment of all the debts of the estate; but she cannot by a petition to the Court of Probates, require the administrator of her husband's estate to account, and recover judgment for a specific sum against him, with interest from judicial demand, and cause herself to be placed on the *tableau* of distribution for such sum as if she were a creditor of the estate. An administrator owes but one account to the legal representatives of the deceased; and the judgment of the court, rendered contradictorily with the heirs and the widow, on a motion to homologate the account rendered by the administrator, should ascertain the balance due to the estate. Such balance bears interest at five per cent from the time of rendering the account, and the widow is entitled to one-half of it. *Ibid.*

See 7, 8, *supra*.

PORT WARDENS.

See NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

POSSESSION.

1. Where the owner of a plantation, whose title has been divested by a sheriff's sale, is retained by the purchaser on the plantation as a manager, his possession becomes that of his employer. C. C. 3396, 3398, 3401.

Whiting v. *Prentice*, 141.

2. Where a vendor sells the property in a slave, reserving the usufruct during his life, his possession being based upon the reservation of usufruct, cannot support a plea of prescription. One cannot prescribe against his own title, nor change, by his own act, the nature and origin of his possession. C. C. 3480. *Hood* v. *Segrest*, 210.

3. A possessor in bad faith cannot claim any thing for improvements made by him on the premises, where their value does not exceed that of the fruits and revenues received by him. Such a possessor has no claim to the fruits and revenues. C. C. 3416. *Williams* v. *Booker.—Re-hearing*, 256.

PRESCRIPTION.

I. *Prescription by which Property is Acquired.*
II. *Prescription which Releases from Debt.*
III. *Interruption or Suspension of Prescription.*

I. *Prescription by which Property is Acquired.*

1. Property in real estate is acquired by public continuous possession, under the title of owner, for thirty years. *Broussard* v. *Gonsoulin*, 1.

2. Where a vendor sells the property in a slave, reserving the usufruct during his life, his possession being based upon the reservation of usufruct, cannot support a plea of prescription. One cannot prescribe against his own title, nor change, by his own act, the nature and origin of his possession. C. C. 3480. *Hood* v. *Segrest*, 210.

3. The lapse of the time necessary to prescribe, vests a right in the party in whose favor it has run. *Aliter*, where but a part of the time has elapsed. No right is vested but where the prescription is completed; until then it may be destroyed by law, or be suspended, or interrupted by circumstances.

Calvit v. *Mulhollan.—Re-hearing*, 266.

4. One who possesses personal property, not as owner, but as agent, can acquire no title by prescription, even as to third persons.

Dutton v. *Rousseau*, 266.

II. *Prescription which Releases from Debt.*

5. The prescription of five years, established by art 3505 of the Civil Code,

does not apply to a promissory note not transferrable by endorsement or delivery. Such a note is prescribed by ten years. C. C. 3508.

Whiting v. *Prentice*, 141.

6. The prescription of one year established by art. 3499 of the Civil Code, does not apply to the claim of one who has paid for another bills due by him to an inn-keeper. Such a claim is only prescribed by ten years. C. C. 3508. *Owen* v. *Holmes*, 148.

7. The prescription of three years established by art. 3503 of the Civil Code against actions for the recovery of money lent, does not apply to the claim of one who has paid the bills or obligations of another, at his request, either in money or by drafts on a third person. Such an action is only prescribed by ten years. C. C. 3508. *Ibid.*

8. A promissory note, not transferrable by endorsement or delivery, is not prescribed by five years. C. C. 3505. *Ibid.*

9. Where one pays the debt of another at his request, the action to recover the money advanced is not prescribed by the prescription applicable to the debt itself. The action to recover the amount is a personal one, which is only prescribed by ten years. C. C. 3508. *Ibid.*

10. Prescription does not run against the right which an administrator has to claim credit for debts of the succession paid by him. The relation of debtor and creditor does not properly exist between him and the estate, until after rendering his accounts, a balance has been struck for or against him. Whenever he may file his account, he will be entitled to credit for all sums legally paid for the estate, whatever may be the date of the payments.

Succession of Blakey, 155.

11. Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case. *Ibid.*

12. Plaintiff having sued defendants, a banking company, on notes issued by them, certain persons intervened, alleging that defendants had assigned to them their whole property for the benefit of their creditors; and plaintiff, in answer to the petition of intervention, averred that the assignment was illegal. The intervenors having pleaded the prescription of one year against revocatory actions: *Held*, that the assignees, by seeking to avail themselves of the assignment by way of intervention, became thereby plaintiffs or actors, and that the illegality being set up by way of exception, prescription cannot be pleaded, under the rule *Quæ temporalia*, &c.

Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

13. Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception. *Ibid.*

14. After the dissolution of a partnership, none of the members can bind the the rest, nor the partnership, for the payment of a debt which has been prescribed. *Buard* v. *Lémée*, 243.

15. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Collier* v. *His Creditors*, 398.

16. The provision of art. 1176 of the Civil Code, which gives an action to the creditors of a succession, who present themselves for the first time after the distribution of the assets among the other creditors, to compel the latter to refund so much as may be necessary to give the rest the proportion they would have been entitled to receive, had they presented themselves at the time of the payment of the debts, can only avail those creditors whose claims have not been prescribed before the expiration of the three years within which such an action may be brought. *Succession of Dubreuil*, 507.

III. *Interruption or Suspension of Prescription.*

17. An acknowledgment of the debt by the maker of a note does not interrupt prescription as to the endorser. They are not debtors *in solido* in the meaning of arts. 2092, 3517 of the Civil Code, which declare that a suit brought against one of the debtors *in solido*, or his acknowledgment of the debt, interrupts prescription as to the rest. *Per Curiam:* The maker and endorser do not bind themselves at the same time, or by the same contract, but by different and successive contracts, without any privity or reciprocity. Debtors *in solido* are, among themselves, liable each only for his portion (C. C. 2099); if one pays the whole debt, he can claim from each of the rest only his portion; and if one be insolvent, his portion must be divided among the solvent obligors. C. C. 2100. *Aliter*, as to the maker and endorsers of a note or bill; each endorsement is a distinct contract; if payment be made by the maker, or first endorser, neither can claim anything from subsequent endorsers; while, if it be the last endorser who pays, he may claim the whole amount from any previous endorser or the maker; and each endorser has the same right against every previous endorser and the maker. *Jacobs* v. *Williams*, 183.

18. An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the

holder, their liability depends on the rules applicable to negotiable instruments in general. *Ibid.*

19. The words *joint debtor* in art. 3517 of the Civil Code, were inserted in the English text of that article, through an error of the translator or transcriber. The article must be interpreted as applying to debtors *in solido*.

Ituard v. *Lémée*, 243.

20. The acknowledgment of a debt by one joint debtor, or a suit brought by or against one of several joint debtors, does not interrupt prescription as to the rest. *Ibid.*

21. To interrupt or renounce prescription, the acknowledgment must be of a particular, specific debt. Proof that the party acknowledged in conversations with the witnesses, that he was largely indebted to the plaintiff, is insufficient. *Ibid.*

22. Prescription ran against a vacant estate, under the Code of 1808. Book 3, tit. 20, art. 62. The law is the same under the Code of 1825. Art. 3492. *Calvit* v. *Mulhollan*, 258.

23. Plaintiff claimed, as heirs of their mother, one-half of a tract of land belonging to the community of *acquêts*, sold by the husband after the death of the wife. The sale was made while the Code of 1808 was in force. The husband after the wife's death became the natural tutor of the plaintiffs, then minors, and retained the community property in his possession, but took no steps to open the succession of the wife, and no one claimed possession of it either as heir or under any other title. Defendants pleaded the prescription of ten years. *Held*, that the succession being, according to the Code of 1808, a vacant one, prescription ran against the estate, and in favor of the defendants from the date of the sale till the promulgation of the new Code on the 20th June, 1825; that after its promulgation the succession ceased to be vacant, the heirs becoming from that moment seized of it; that no prescription could run against such of the heirs as were then minors; and that to ascertain whether the action of any heir was prescribed by the lapse of ten years, the time between the sale and the promulgation of the Code of 1825, should be added to that between the majority of the heir and the institution of the suit. C. C. 934 to 939, 3488, 3492. *Ibid.*

24. Where the purchaser of property sold under execution, subject to a special mortgage given to secure the payment of a note, retains the amount of the mortgage as a part of the price, and subsequently makes a partial payment to the mortagee, the payment will interrupt prescription both as to the original debtor and the purchaser, being made in discharge of the former, and with his implied assent. *Collier* v. *His Creditors*, 398.

25. Prescription running in favor of a debtor is not suspended by his death. C. C. 3487. The rule *contra non valentem, &c.*, does not apply to the creditors, who may interrupt prescription, by presenting their claims to the administrator, and obtaining his acknowledgment thereof, and an order from the judge classing them among the acknowledged debts of the succession, or, in case of the refusal of the administrator to acknowledge them, by suit. C. P. 984, 985, 986. *Succession of Dubreuil*, 507.

26. The acknowledgment of an administrator of a claim against a succession, unaccompanied by an order of the judge directing it to be ranked among the acknowledged debts of the succession, merely interrupts prescription, which will commence to run anew from that time; and where sufficient time subsequently elapses before any further action on the part of the creditor, the claim will be prescribed. *Ibid.*—*Re-hearing*, 511.

PRESUMPTION.

See EVIDENCE, II.

PRISON-BOUNDS BOND.

At the time of executing a prison-bounds bond by a debtor arrested under final process, the prison-limits were, under the statute of 25 February, 1837, co-extensive with the boundary of the parish in which he resided. A new parish was afterwards formed from that portion of the old in which the debtor resided, and from part of a contiguous parish, and the seat of justice of the new parish established at a place never within the limits of the old. In an action against the surety on the bond, it was proved that the debtor had gone to the seat of justice of the new parish: *Held*, that the statute creating the new parish cannot have rendered the condition of the debtor more onerous by compelling him to remain within the restricted limits of the old parish; that, by the creation of the new parish, the debtor was either released altogether, or became a prisoner, in the custody of his bail, within the limits of the new parish; and consequently, that the bond was not forfeited. *Guion* v. *Ford*, 123.

PRIVILEGE.

1. No tutorship exists during the marriage over the children born of it. C. C. 234. While the marriage exists, the father is the administrator of the estate of his minor children, and he is accountable for the property and revenues of the estate, the use of which he is not entitled to by law, and for the property only of such as the law gives him the usufruct of: his administration ceasing at the majority or emancipation of the children. C. C. 267, 239, 240. But the child has no legal mortgage or privilege on the property of the father as a security for his faithful administration during the marriage. C. C. 552, 553, 555, 3280 to 3288.

Cleveland v. *Sprowl*, 172.

2. The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death. *Buard* v. *Lémée*, 243.

3. The vendor of a tract of land received from the purchaser his note for the price, endorsed by a third person. A mortgage was reserved by the notarial act of sale to secure the payment of the note, which was duly *paraphed* by the notary. The act was recorded in the mortgage office, and on the same day the vendor wrote on the face of the record, that "the mortgage is hereby released, without, however, acknowledging payment of the price of

the purchase money." The release was gratuitous, and no third person had acquired any rights under it. In an action by plaintiffs, who had discounted the note, which was protested for non-payment, against the endorsers and the maker, claiming the vendor's privilege: *Held*, that there is a difference between a special mortgage reserved to secure the price of the thing sold and the vendor's privilege: that the release of the mortgage did not extinguish the privilege, which resulted from the terms of the act; and that the parties cannot avail themselves of the release of the mortgage, to the prejudice of plaintiffs, who took the note on the faith of their signatures and endorsements, and with reference to an act which showed a sale on credit and an express acknowledgment, accompanying the release, that the price had not been paid. *Citizens Bank* v. *Cuny*, 279.

4. Where the proprietor of a plantation on which an overseer is employed by the year, sells the plantation, and the overseer remains in the employment of the purchaser for the rest of the year, receiving his wages for that period from the latter, and continues with the purchaser for the succeeding year, he has no right or privilege on the crop of the second year, made by the purchaser after the sale, for wages due to him by the former proprietor for the preceding year. C. C. 3184, § 1. *Welsh* v. *Shields*, 527.

5. An overseer being entitled to one-fourth of the crop for his services, a creditor of the owner of the plantation seized under a *fi. fa.* three-fourths of the growing crop, and became the purchaser thereof at the sheriff's sale. In an action by the overseer against the purchaser; *Held*, that the seizure did not operate as a partition between the overseer and his employer, nor restrict the right of the former to the fourth not seized; and that the purchaser, acquiring no greater right than his debtor had, is liable to the overseer for one-fourth of the price for which the three-fourths of the crop were sold. *Baudoin* v. *Nicolas*, 574.

6. The act of 22 March, 1843, ch. 66, which provides (sect. 5,) that the privilege granted to the city of Lafayette on property within its limits, for the proportion to which the owner is liable for any work done, or for taxes assessed thereon, shall only exist where an account thereof, duly certified, has been recorded in the office of the Recorder of Mortgages of the parish of Jefferson, does not apply to work done or taxes assessed before the date of that act; the right of the city to recover the cost of such work, or such taxes, must be governed by sects. 6 and 8 of the act 12 March, 1836. The act of 1836, gives a privilege only for work done, and not for taxes; no law previous to the act of 1843 gave any privilege for the latter.
Mechanics and Traders Bank v. *Richardson*, 596.

See SALE, 24, 25.

PUBLIC LANDS OF THE UNITED STATES.

1. A confirmation of a land claim by the government of the United States, amounts to no more than a relinquishment of all its rights to the land; it has no effect against third persons. *Broussard* v. *Gonsoulin*, 1.

2. Where parties claiming to be owners of a tract of land, prove an application by each to a Spanish Commandant for a grant of the premises, and a confirmation to each by the United States, but no complete title or grant to either from the Spanish government, and the first applicant is not shown to have ever been in possession, but the last is proved to have possessed and cultivated the premises for a number of years, the claim of the latter must prevail. *Ibid.*

QUASI-CONTRACTS.

1. Money placed in the hands of a cashier of a bank to be transmitted to a branch, having been lost through his negligence, to protect himself from suspicion he gave his notes for the amount, endorsed by a third person, the surety on the bond given by the cashier for the faithful discharge of his official duties. The notes having been paid by the endorser, in an action by the latter to recover the amount paid on the ground of error and illegality or want of consideration: *Held*, That the consideration for which the notes were given was not illegal; and that the obligation of the cashier to make good any loss occasioned by his neglect, if not a legal obligation, was, at least, a natural one, and sufficient to prevent the endorser from recovering back the amount paid by him. C. C. 2281, 2285.

Marigny v. *Union Bank of Louisiana*, 283.

2. Plaintiff having seized, under a *fi. fa.*, a sum in the hands of a third person, as the property of defendants, his debtors, the State intervened, alleging that the amount had been illegally paid to such third person by the treasurer: *Held*, That the payment being unauthorized, the amount should be returned into the treasury. *Jore* v. *Commercial Library Society*, 311.

RESCISSION, ACTION OF.

See SALE, V.

RECONVENTION.

See PLEADING, IV.

SALE.

I. *Requisites and Proof of Sale.*
II. *Obligations and Privilege of Vendor.*
III. *Obligations of Vendee.*
IV. *Rescission.*
V. *Judicial Sales.*

I. *Requisites and Proof of Sale.*

1. A debtor of plaintiffs proposed to sell to them his crop of cotton, the proceeds to be deducted from his debt. Plaintiffs were to give the current price for the cotton, and the sale was intended to be by weight. Plaintiffs' agent went

to the debtor's plantation, where he found in the gin and cotton-house a quantity of cotton in the seed, which the debtor told him, in the presence of witnesses, that he then delivered to him for his principals. The cotton was left on the place to be *ginned*, and pressed into bales. When a part had been put into bales, the agent marked them with plaintiff's initials, and had them hauled to the river for shipment, and while there they were seized under a *fi. fa.* at the suit of another creditor; and the remainder of the cotton on the plantation was seized at the same time, under the same writ. The cotton had not been weighed; the keys of the building in which the *unginned* cotton was, had not been delivered to plaintiff's agent; nor was it proved that it could not have been removed. In an action by plaintiffs against the seizing creditor and the sheriff: *Held*, that the sale was incomplete as to third persons, for the want of delivery. C. C. 2433, 2442, 2452, 2453. *Lambeth* v. *Wells*, 51.

2. A parol agreement to sell personal property, cannot protect it from seizure, where there has been no legal delivery. *Ibid.*

3. Where an act of sale of real property was signed by the parties in the presence of a parish judge, acting as a notary, no other proof of execution is necessary to authorize its being recorded, and to give it the effect against third persons which the law allows to acts *sous seing privé* duly registered. C. C. 2242, 2250. *Hood* v. *Segrest*, 210.

4. An act of sale, not authentic, owing to the want of the signature of one of the witnesses, or through any other defect of form, is good as a private writing, if signed by the parties. C. C. 2232. *Ibid.*

5. The letters of a party acknowledging that, in consideration of a certain sum, a third person had become jointly and equally interested with him in the purchase of real estate held in his name, and agreeing, for a fixed price, to convey to the same person one-half of his interest in a purchase of other lands, is evidence of a sale as between the parties, and the lands may be mortgaged by the purchaser, or subjected to legal mortgages as his property. *Per Curiam:* A sale, as between the parties, is complete as soon as there exists an agreement as to the object and the price, though the object be not delivered, nor the price paid, (C. C. 2413, 2431); the only formality required by law, as between the parties, is that the sale, when of immoveables, shall be in writing. C. C. 2415. *Barrett* v. *His Creditors*, 474.

6. A promise to sell amounts to a sale, where there exists a reciprocal consent of both parties as to the thing and the price thereof. C. C. 2437. *Ibid.*

7. Plaintiff's vendor sold him a lot of ground in the possession of a third person, for a certain sum payable whenever plaintiff should recover possession, and in consideration of his instituting and carrying on, at his expense, the necessary proceedings to recover the property. The vendor's title was founded on occupation by his ancestor, under a permission from a Spanish Governor. Plaintiff obtained a patent from the United States for the lot, but several years after, and before any action had been commenced by plaintiff against the party in possession, or the price had been paid, his vendor

sold the lot to defendants, who recovered possession, and paid the price stipulated in the act of sale to them. The first sale was made while the Code of 1808, and the Spanish laws were yet in force. In an action by the first purchaser against the defendants to recover the lot: *Held*, that the plaintiff not having complied with the terms of the first sale, his right to the lot was but inchoate at the time of the second; that the sale to defendants having been followed by the delivery of the thing and the payment of the price, must prevail; and that the only remedy of the plaintiff is by an action, *ex empto*, for damages against his vendor. *Lafon* v. *De Armas*, 598.

8. Though the right to demand the thing sold, on complying with the terms of the sale, is acquired by the purchaser, as to the seller, as soon as there exists an agreement between them as to the thing and the price, the sale is not complete as to third persons, until the price has been paid, unless a definite term has been granted for the payment, and the possession delivered. Code of 1808, book 3, tit. 6, arts. 1, 4, 24, 26, 36, 82, 86. *Ibid.*

II. *Obligations and Privilege of Vendor.*

9. Plaintiff sold defendant certain land, warranting it free from incumbrance, and taking notes from the latter, with a mortgage, for the price. Defendant resold it to a third person, also reserving a mortgage. The second purchaser failing to pay the price, defendant took out an order of seizure and sale, and the property was offered for sale, and a bid made for an amount exceeding that due from defendant to plaintiff, but no adjudication could take place, in consequence of plaintiff's failure to erase a mortgage in favor of a third person, which existed at the time of his sale to defendant. Plaintiff subsequently took out an order of seizure and sale on his mortgage, when, after several attempts to sell, the mortgage existing at the date of the first sale was erased by plaintiff, and the property sold for a sum much less than was offered at the sale under defendant's order of seizure. In an action by plaintiff to recover the balance due on defendant's notes, and plea in reconvention claiming damages for plaintiff's failure to erase the mortgage: *Held*, that the measure of the damages to which defendant is entitled, is the difference between the price for which the property actually sold, and that which might have been obtained had the mortgage been erased at the proper time. *Wilkins* v. *Bassett*, 28.

10. The vendor of a tract of land received from the purchaser his note for the price, endorsed by a third person. A mortgage was reserved by the notarial act of sale to secure the payment of the note, which was duly *paraphed* by the notary. The act was recorded in the mortgage office, and on the same day the vendor wrote on the face of the record, that "the mortgage is hereby released, without, however, acknowledging payment of the price of the purchase money." The release was gratuitous, and no third person had acquired any rights under it. In an action by plaintiffs, who had discounted the note, which was protested for non-payment, against the endorsers and the maker, claiming the vendor's privilege: *Held*, that there is a difference

between a special mortgage reserved to secure the price of the thing sold and the vendor's privilege: that the release of the mortgage did not extinguish the privilege, which resulted from the terms of the act; and that the parties cannot avail themselves of the release of the mortgage, to the prejudice of plaintiffs, who took the note on the faith of their signatures and endorsements, and with reference to an act which showed a sale on credit, and an express acknowledgment, accompanying the release, that the price had not been paid. *Citizens Bank* v. *Cuny*, 279.

III. *Obligations of Vendee.*

11. Where a purchaser promises in a written memorandum signed by him, to pay the price "by acceptance and note," the vendor must prove a demand of such acceptance and note, to entitle him to recover in an action on the memorandum for the price in money. *Offutt* v. *Morancy*, 93.

12. Though an heir who purchases property at a sale of the effects of the succession, is not obliged to pay the surplus of the price above the portion coming to him, until this portion is definitely fixed by a partition, (C. C. 1265, 2603); yet where interest from a certain time was stipulated as a part of the price of the property purchased, he will be bound to pay it, though from a period anterior to the partition of the property. *Per Curiam:* Were it otherwise, the condition of the heirs who purchase would be more favorable than that of the rest. *Marionneaux* v. *Marionneaux*, 666.

IV. *Rescission.*

13 Where a party sues to annul a conveyance of land which he alleges was fraudulently obtained, to his prejudice as a previous purchaser from the same vendors, to the knowledge of one of the defendants who acted as agent of the other, and prays to be declared the owner of the land, and for damages, the action will not be dismissed on an exception that it is brought in a parish which was neither the residence of the defendants, nor that in which the land was situated. *Per Curiam:* The action is rather a personal one, to obtain redress for a fraud, the effect of which was to deprive the plaintiff of a right previously acquired, than a real one to recover the land itself in the adverse possession of defendants; and though the annulling of the contract would confirm, as against the defendants, plaintiff's title to the land, the gist of the action is the cancelling of a contract. *Copley* v. *Berry*, 79.

14. Where a plaintiff recovers judgment in an action to annul a conveyance of land alleged to have been fraudulently obtained by the defendants, to his prejudice, from his vendors, defendants cannot complain that the judgment did not decide between such vendors, as their warrantors, and themselves. *Per Curiam:* If the conveyance was obtained by fraud, there was no valid assent, and no contract of sale, from which the obligations of warranty could result, ever existed; and the right of the defendants to recover back what was really paid under such a contract, may well be questioned. *Ex turpi causa non oritur actio. Ibid.*

15. A declaration by the vendor in an act of sale *sous seing privé*, that the price had been paid, is not proof of payment against third persons.

Fisher v. *Moore*, 95.

16. Where an act of sale is attacked by a creditor of the vendor as simulated, on the ground that no price was paid, proof of payment of the price is on the party interested to maintain the sale. The creditor cannot be required to prove a negative. *Ibid.*

17. Though a creditor cannot treat a conveyance of real estate by his debtor alleged to be fraudulent, as null, and seize under a *fi. fa.* the property in the hands of his vendee; yet if the latter do not enjoin the proceedings, but permits the sheriff to seize and sell the property as still belonging to his vendor, and afterwards sues the purchaser at the sheriff's sale to annul the sale, and cause himself to be declared the owner of the property, the creditor, cited in warranty, may plead by way of exception, whatever he might have urged in a direct action to annul the first sale. *Ibid.*

18. A creditor having obtained a judgment against his debtor, caused certain property to be sold under execution, and became the purchaser. In an action by other creditors, against the debtor and purchaser, to annul the sale as fraudulent and intended to give an unjust preference to the latter, plaintiffs offered to prove declarations made by the debtor, out of the presence of the seizing creditor, tending to establish the fraudulent intention of the parties: *Held*, that the evidence, though insufficient to prove the alleged fraud as against the seizing creditor, was admissible.

Whiting v. *Prentice*, 141.

19. To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent.

Ibid.

20. The acknowledgment by the vendor, in an authentic act of sale of real estate, that the price had been received by him, can be contradicted only by a counter letter, or by the acknowledgment of the purchaser, or his heirs, in answer to interrogatories on facts and articles.

Succession of Thomas, 215.

21. To annul a sale of community property made by a husband, it is not enough, under art. 2373 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife. *Succession of Packwood*, 334.

22. Defendant, an illegitimate child, duly acknowledged, having been appointed by the testator, who died without other descendants, his universal heir and legatee, and put in possession of the property by the court before which the will was admitted to probate, sold certain land forming part thereof to a third person. In an action subsequently commenced by plaintiffs, who were sisters of the deceased, against the universal legatee and her vendee, claiming each one-half of the succession: *Held*, that the purchaser cannot have acquired by the sale any greater right than his vendor had to the property;

that plaintiffs having survived the testator, he could only dispose of one-fourth of his estate in favor of his natural child; and that the sale made by the latter must be annulled for three-fourths thereof, where the purchaser has not acquired title by the prescription of ten years, if a resident of the State, or twenty years if a non-resident. C. C. 3442, 3450, 3451. But where such property was purchased by a city corporation, for a fair price, to enable it to open a street for the public benefit, the sale will not be annulled, but the legitimate heirs will be left to their recourse against the universal legatee who received the price. C. C. 2604 to 2611.

Balot y Ripoll v. *Morina*, 553.

V. *Judicial Sales.*

23. Where property has been seized under a *fi. fa.*, before the return day, the sheriff may retain the writ, and sell the property after the time fixed for its return. *Labiche* v. *Lewis*, 8.

24. To prevent the sacrifice of debts seized under a *fi. fa.*, the parties to the execution agreed that the sheriff should suspend the sale and retain the writ after the return day, authorizing an agent to proceed to collect the debts. Other creditors of defendants in execution, subsequently to this agreement, levied a *fi. fa.* on the same debts in the hands of the sheriff, and it was agreed between them and the plaintiff in the original execution, that the debts should be sold under the first writ, "the proceeds of the sale to be held by the sheriff, subject to the orders of the proper court." In an action to determine which of the seizing creditors was entitled to the proceeds: *Held*, that no bad faith being imputed to the parties, they had a right to suspend the sale; that the debts never ceased to be under the control of the sheriff; that having permitted the sale to be made under the first execution, the creditors in the second execution cannot attack its legality; and that the creditor who first seized is entitled to a preference on the proceeds of the sale. C. P. 722. *Ibid.*

25. Notice to the debtors is not required where debts or credits have been seized under a *fi. fa.*; such notice is only necessary where a debt or credit has been transferred or assigned. The seizure of a debt does not transfer the property in it to the seizing creditor; it gives him only a right to be paid out of its proceeds when sold, until which time the defendant is not divested of his title. *Ibid.*

26. A sale under a *fi. fa.*, made before the promulgation of the statute of 6 April, 1843, ch. 135, in a parish in which a newspaper was published at the time, and not advertised therein as directed by art. 669 of the Code of Practice, will be annulled, unless in cases embraced by the statute of 26 February, 1828, ch. 29, where the amount of the judgment under which the seizure was made, is less than three hundred dollars.

Ex parte Groves, 130.

27. Where the price bid at a sale under a *fi. fa.*, does not exceed the amount of anterior special mortgages existing on the property, there can be no adjudication. C. P. 684. *Ibid.*

28. Where the owner of property seized under execution becomes its purchaser, at a credit of twelve months, he cannot be considered as acquiring any new right or title by the adjudication, which is not strictly a sale, but a means by which the creditor acquires additional security for his debt. Nor will the sureties on the bond be discharged by the omission of the creditor to require the execution of an act of sale to the debtor, with the reservation of a mortgage on the property to secure the price, though the sureties might, for their own protection, have insisted on such an act of sale being executed and recorded. *Aliter*, if, having received a mortgage, the creditor had subsequently released it; in such a case the sureties would be discharged. C. C. 3030. *Coons* v. *Graham*, 206.

29. Where the principal in a twelve-months bond is estopped by his execution of the bond from urging any informalities in the sale, as a defence to an action on the bond, his sureties, bound *in solido* with him, will be equally estopped from setting up any such defence. *Ibid.*

30. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Collier* v. *His Creditors*, 398.

See 12, 18, 19, *supra*.

SEQUESTRATION.

Defendant in a proceeding instituted in his own name, having caused certain slaves belonging to plaintiffs to be sequestered as the property of his debtor, an insolvent, subsequently qualified as syndic of the creditors of the latter, and in that capacity proceeded to advertise the slaves for sale. In an action by plaintiffs to arrest the sale, and for damages for the illegal sequestration: *Held*, that damages were properly allowed against the defendant individually. *Calmes* v. *Carruth.—Re-hearing*, 663.

SPANISH GOVERNMENT OF LOUISIANA.

According to the usages of the Spanish government of Louisiana, a double concession of land could be granted only in the rear of the front tract.
Broussard v. *Gonsoulin*, 1.

STATE, JURISDICTION OF.

The jurisdiction of a State, in civil cases, is co-extensive with its territory,

except where it has consented to part with a portion of it, under the constitution of the United States; and it extends over every portion of its soil severed from the public domain. *Dreux* v. *Kennedy*, 489.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the State.*

II. *Statutes of Mississippi.*

I. *Statutes of the State.*

1805, July 3, § 5. Notarial acts. *Keller* v. *McCalop*, 639.
1808, March 31, § 6. Attorneys at law. *Turner* v. *Walsh*, 383.
1813, —— 28, § 8. Fees of notaries. *Keller* v. *McCalop*, 639.
1814, December 21. Police of slaves. *State* v. *Thomas*, 48.
1815, February 6. Oaths of office. *Thompson* v. *Nicholson*, 326.
1817, —— 20, § 9. Voluntary surrender—Sequestration of insolvent's property. *Calmes* v. *Carruth—Re-hearing*, 663.
1823, March 27, § 3. Attorneys at law. *Turner* v. *Walsh*, 383.
1826, —— 22, § 1. —— *Ibid.*
1827, —— 9. Authorizing inhabitants of Iberville to raise money by lottery. *Potts* v. *Camp*, 646.
—— 13. Bills of exchange and promissory notes. *Grand Gulf Railroad and Banking Company* v. *Barnes*, 127. *Bell* v. *Lawson*, 152.
1828, February, 28. Advertisement of judicial sales. *Ex parte Groves*, 130.
——, March 7. Amending act authorizing inhabitants of Iberville to raise money by lottery. *Potts* v. *Camp*, 646.
—— 25, §§ 1, 2. Tax on property bequeathed to or inherited by foreigners or non-residents. *Succession of Mager*, 584.
1831, March 25, § 3. Injunction. *Williams* v. *Planters Bank*, 125.
1833, —— 1, § 1. Gas lights in New Orleans. *Gas Light and Banking Company* v. *Paulding*, 378.
1835, April 1, § 36. Incorporating New Orleans Gas Light and Banking Company. *Ibid.*
——, §§ 10, 27. Incorporating Exchange and Banking Company of New Orleans. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
1836, March 12, §§ 6, 8. Amending charter of city of Lafayette. *Mechanics and Traders Bank* v. *Richardson*, 596.
1837, February 25. Prison bounds. *Guion* v. *Ford*, 123.
——, March 13. Settlement of successions. *Succession of Dubreuil.—Rehearing*, 511.
1838, —— 7, § 5. Days of public rest. *Garland* v. *Holmes*, 421. *Keller* v. *McCalop*, 639.
1839, —— 20, § 13. Interrogatories to third persons under a *fi. fa.* *Petway* v. *Goodin*, 445. *Poole* v. *Brooks*, 484.

1839, March 20, § 19. Appeal. *Oliver* v. *Williams*, 180.
——————— § 24. Jury, in what cases not allowed. *Hennen* v. *Bourgeat*, 522.
1842, ——— 14, §§ 12, 23, 24. Liquidation of banks. *French* v. *Landis*, 639.
——————— 26, § 4. Imposing tax on property bequeathed to or inherited by non-resident alien. *Succession of Mager*, 584.
———————§ 9. Imposing tax on money and exchange brokers. *State* v. *Nathan*, 332.
1843, February 10. Interrogatories to a party. *Graves* v. *Hemken*, 103.
——, March 22. § 5. Amending charter of city of Lafayette. *Mechanics and Traders Bank* v. *Richardson*, 596.
——————— 27. § 2. Judicial partitions. *Succession of Pigneguy*, 450.
———————. § 3. ——————— *Mayo* v. *Stroud*, 105.
——, April 6. Advertisement of judicial sales. *Ex parte Groves*, 130.

II. *Statutes of Mississippi.*

1822, June 25. Interest. *Coxe* v. *Rowley*, 273.
1840, February 21. § 7. Banks. *Williams* v. *Planters Bank*, 125. *Marshall* v. *Grand Gulf Railroad and Banking Company*, 198.
——————— 22. Banks. *Williams* v. *Planters Bank*, 125.

SUCCESSIONS.

I. *Jurisdiction in Matters of Succession.*
II. *Presumption as to Property found in Possession of Deceased.*
III. *Vacant Successions.*
IV. *Of Executors, Administrators and Curators.*
V. *Claims against Successions.*
VI. *Sale of Property.*
VII. *Of Heirs and Legatees.*

I. *Jurisdiction in Matters of Succession.*

1. Courts of Probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam:* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate. *Hemken* v. *Ludewig*, 188.

2. A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together; and a probate court is without jurisdiction as to the latter. *Ibid.*

3. The executor of the will of one who was domiciliated and died in another State, deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here; and that part of the estate of the deceased only, is under the control of the courts of this State. *Succession of Packwood*, 334.

4. A husband and wife, between whom a community of *acquests* existed in this State, having acquired a plantation which formed part of the community property, subsequently removed into a State where the common law prevails. After their removal, the husband and wife sold the plantation. After the death of the wife, the husband and the purchaser cancelled the sale; the notes given for the price were returned to the purchaser, and the plantation re-conveyed to the husband. The husband having qualified in this State as executor of his wife, on an opposition to an account filed by him, made by the heirs of the wife, claiming that the retrocession should enure to the benefit of the community, or that the husband should account to the heirs of the wife for one-half of the price: *Held*, that on the retrocession, the title vested in the husband alone; and that if the wife had any interest in the notes, the executor is not bound to account for it here, as both spouses lived in another State at the time, and the fund does not belong to the community. *Ibid.*

5. Where real estate belonging to a community existing between a husband and wife, is sold by the husband, and the spouses afterwards remove from this State, and the wife dies out of this State, the husband will not be accountable here for the price, if not existing here at the death of the wife. *Per Curiam:* The husband is no more accountable for that transaction than for the price of any other property sold by him before the dissolution of the community. *Ibid.*

II. *Presumption as to Property found in Possession of Deceased.*

6. Property of all kinds found in the possession of a person at the time of his death, is presumed to belong to his succession. *Lynch* v. *Benton*, 113.

III. *Vacant Successions.*

7. Under the Code of 1808 a succession was vacant, when no one claimed possession of it as heir, or under any other title. Book 3, tit. 1, art. 118. *Aliter* under the Civil Code of 1825. By this Code the heir becomes seized of the succession by the mere operation of law, from the moment it is opened by the death of the ancestor, before taking any steps to put himself

in possession, or expressing any willingness to accept, and even though ignorant that the succession was opened in his favor. C. C. 934 to 939.

Calvit v. *Mulhollan*, 258.

8. Prescription ran against a vacant estate under the Code of 1808. Book 3, tit. 20, art. 62. The law is the same under the Code of 1825. Art. 3492. *Ibid.*

9. Plaintiffs claimed, as heirs of their mother, one-half of a tract of land belonging to the community of *acquêts*, sold by the husband after the death of the wife. The sale was made while the Code of 1808 was in force. The husband after the wife's death became the natural tutor of the plaintiffs, then minors, and retained the community property in his possession, but took no steps to open the succession of the wife, and no one claimed possession of it either as heir or under any other title. Defendants pleaded the prescription of ten years. *Held*, that the succession being, according to the Code of 1808, a vacant one, prescription ran against the estate, and in favor of the defendants from the date of the sale till the promulgation of the new Code on the 20th June, 1825; that after its promulgation the succession ceased to be vacant, the heirs becoming from that moment seized of it; that no prescription could run against such of the heirs as were then minors; and that to ascertain whether the action of any heir was prescribed by the lapse of ten years, the time between the sale and the promulgation of the Code of 1825, should be added to that between the majority of the heir and the institution of the suit. C. C. 934 to 939, 3488, 3492. *Ibid.*

10. The State is entitled to a succession only in case of there being no lawful relation, husband or wife, or acknowledged natural child of the deceased, or of its not being claimed by any one entitled thereto. C. C. 477, 911, 923.

Succession of Mager, 584.

IV. *Of Executors, Administrators and Curators.*

11. Action against defendant personally for the amount of a promissory note, signed by him as executor, and endorsed by two other persons. It was proved that the note was given in part renewal of one made by defendant's testator, endorsed by the same persons, and which had been discounted for the deceased by plaintiffs; that the original note of the deceased was for a larger amount, which had been reduced in his lifetime by curtailments; and that, after his death, the debt was diminished by further curtailments, and the execution of new notes, signed by the defendant, as executor of the estate of deceased, or simply as executor, until reduced to the amount for which the note sued on was executed. *Held*, that the defendant is not liable personally; that the facts show that it was not originally contemplated by any of the parties that he should be so responsible; that the execution of the note sued on created no liability on the part of the estate of the deceased, nor even changed the nature of the original obligation, but was a mere acknowledgment of a debt which the executor was competent to make.

Bank of Louisiana v. *Déjean*, 16.

12. An administrator or executor cannot change the nature of the obligations of the succession, not increase its responsibility with regard to outstanding

debts, nor subject it to any new liabilities; if he attempt to do so, he will be personally bound. But he may acknowledge claims due by it, (C. P. 985,) pay or reduce its debts in due course of administration, or perform any other acts necessary for its liquidation. *Ibid.*

13. Tutors of minor heirs are not entitled, *ex officio*, to administer successions accruing to their wards. They may claim the administration, where there are no beneficiary heirs of age, in preference to any other person; but they must give security and qualify as other administrators. C. C. 1034, 1037. *Arthur* v. *Cochran*, 41.

14. An admission of the genuineness of the signatures to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payments claimed by him; but where such payments are made, without any order of court, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller* v. *Miller*, 88.

15. Prescription does not run against the right which an administrator has to claim credit for debts of the succession paid by him. The relation of debtor and creditor does not properly exist between him and the estate, until after rendering his accounts, a balance has been struck for or against him. Whenever he may file his account, he will be entitled to credit for all sums legally paid for the estate, whatever may be the date of the payments. *Succession of Blakey*, 155.

16. The "bad debts" to be deducted from the amount of the inventory of a succession to ascertain the sum for which an administrator must give security, (C. C. 1041,) and the amount on which his commissions are to be calculated, (C. C. 1062,) are such debts as are prescribed, or due by bankrupts who have surrendered no property to be divided among their creditors. All other debts due to the estate must be taken into consideration in ascertaining the amount of the security, or the sum upon which the administrator is entitled to claim commissions; and as the administrator is bound to use due diligence to collect such debts, he is entitled to charge his commissions on their amount, whether he succeed in collecting them or not. *Ibid.*

17. A widow, who has accepted the community, is entitled to one-half of the balance found due after a full administration and the payment of all the debts of the estate; but she cannot by a petition to the Court of Probates, require the administrator of her husband's estate to account, and recover judgment for a specific sum against him, with interest from judicial demand, and cause herself to be placed on the *tableau* of distribution for such sum as if she were a creditor of the estate. An administrator owes but one account to the legal representatives of the deceased; and the judgment of the court, rendered contradictorily with the heirs and the widow, on a motion to homologate the account rendered by the administrator, should ascertain the balance due to the estate. Such balance bears interest at five per cent from the time of rendering the account, and the widow is entitled to one-half of it. *Succession of Thomas*, 215.

18. Rule on defendant to show cause why an execution should not be issued against her individually for a debt due by the succession of which she was

curatrix. Defendant failed to appear. The rule was made absolute, and she appealed. The citation to answer the rule was served on a person stated in the return to be the attorney in fact of the curatrix. There was no allegation in the rule that the defendant was absent from the State; and the power only authorized the attorney to represent her in her capacity of curatrix. *Held*, that the rule must be discharged, for, assuming that defendant was absent at the time of serving the citation, the power only authorized the attorney to represent her as curatrix, and the object of the rule was to render her personally liable. *Wilson* v. *Vincent*, 235.

19. Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age. *Mitchell* v. *Cooley*, 370.

20. In an action by an executor against the sureties of a former executor to recover money received by the latter belonging to the succession, defendants cannot plead in compensation a debt due by the deceased to their principal. The debt must be settled in the ordinary course of law, contradictorily with all the parties interested. *Fink* v. *Martin*, 416.

See 3, *supra*.

V. *Claims against Successions.*

21. Persons holding claims against a succession cannot sue the tutor of the minor heirs, and obtain a judgment against him for debts due by the deceased. Where no executor or administrator has qualified, they must provoke the appointment of an administrator, against whom, as the legal representative of the estate, they may institute suit. C. C. 1031 to 1060. C. P. 974 to 996. *Arthur* v. *Cochran*, 41.

22. Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case.

Succession of Blakey, 155.

23. One not shown to be a creditor of a succession cannot oppose the allowance of claims set up by others. *Succession of Floyd*, 197.

24. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. Such proceedings cannot prejudice their claims against the estate.

Succession of Thomas, 215.

25. The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death. *Buard* v. *Lémée*, 243.

26. A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 2851); but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance. *Ibid.*

27. Where plaintiffs claim, as heirs of their mother, one-half of certain community property sold by the husband after the death of the wife, and the vendee proves that the price of the property was applied to the payment of the debts of the community, he will be entitled to the reimbursement of the amount so paid for its benefit, in proportion to plaintiffs' interest in the community. *Calvit* v. *Mulhollan.—Re-hearing*, 266.

28. In a suit for freedom instituted against the curator of a succession and the tutrix of the heirs, judgment was rendered in favor of the plaintiff, and the tutrix alone appealed, without making the curator a party: *Held*, that the demand of the petition was indivisible, and the judgment a joint one; that it cannot stand as to the curator and be reversed as to the heirs; that no appeal having been taken by the curator within the time prescribed by law, the judgment had become final as to the succession; that the heirs, being minors, could accept the succession only with the benefit of inventory, and, as beneficiary heirs, were entitled only to the residue of the estate after the payment of the debts, (C. C. 1051;) that this residuary interest gave them no authority to represent the succession, and that their separate appeal could not prevent the judgment from becoming final against the estate; and that as the succession, in consequence of the judgment having become final, is concluded thereby, the appellants are also concluded. Appeal dismissed. *Andat* v. *Gilly*, 323.

29. In determining the compensation to be allowed to an attorney appointed to represent the absent heirs of a succession, the court should not be governed by the opinion of other members of the profession as to the amount. It should exercise its own judgment, and the allowance should be made with reference to the labor, skill, and care required, and to the value of the estate. *Succession of Mager*, 413.

30. The provision of art. 1176 of the Civil Code, which gives an action to the creditors of a succession, who present themselves for the first time after the distribution of the assets among the other creditors, to compel the latter to refund so much as may be necessary to give the rest the proportion they would have been entitled to receive, had they presented themselves at the time of the payment of the debts, can only avail those creditors whose claims have not been prescribed before the expiration of the three years within which such an action may be brought. *Succession of Dubreuil*, 507.

31. The acknowledgment of an administrator of a claim against a succession, unaccompanied by an order of the judge directing it to be ranked among the acknowledged debts of the succession, merely interrupts prescription, which will commence to run anew from that time; and where sufficient

time subsequently elapses before any further action on the part of the creditor, the claim will be prescribed. *Ibid.*—*Re-hearing*, 511.

See 17, *supra*; 45, 46, *infra*.

VI. *Sale of Property.*

32. Where one of the heirs mortgages his undivided share in certain immoveables belonging to the succession, and they are subsequently sold under an order of the Probate Court, for the purposes of liquidating and partitioning the succession, the proceeds of the sale of the share so mortgaged will stand in place of the property, and be subject in the hands of the administrator, to the claims of the mortgage creditor, as if no sale had been made. Act 27 March, 1843, s. 2. *Succession of Pigneguy*, 450.

33. A testator having directed that plaintiff, who was joint owner with him of a plantation, and who subsequently qualified as his testamentary executor, should have the privilege of taking his share of the plantation at a certain price, the latter as executor, presented a petition to the Probate Court praying that the attorney of the absent heirs might be cited, and the testator's half of the property adjudicated to him at the price fixed by the will. It was proved that the succession was insolvent. *Held:* that the estate being insolvent, a meeting of the creditors should have been called to deliberate on the most advantageous manner of selling its effects (C. C. 1160); that the creditors alone have a right to fix the time and conditions of the sale of the property; and that the proceedings, not having been carried on contradictorily with the creditors, nor with their consent, must be dismissed *Tucker* v. *Beatty*, 545.

34. Defendant, an illegitimate child, duly acknowledged, having been appointed by the testator, who died without other descendants, his universal heir and legatee, and put in possession of the property by the court before which the will was admitted to probate, sold certain land forming part thereof to a third person. In an action subsequently commenced by plaintiffs, who were sisters of the deceased, against the universal legatee and her vendee, claiming each one-half of the succession: *Held*, that the purchaser cannot have acquired by the sale any greater right than his vendor had to the property; that plaintiffs having survived the testator, he could only dispose of one-fourth of his estate in favor of his natural child; and that the sale made by the latter must be annulled for three-fourths thereof, where the purchaser has not acquired title by the prescription of ten years, if a resident of the State, or twenty years if a non-resident. C. C. 3442, 3450, 3451. But where such property was purchased by a city corporation, for a fair price, to enable it to open a street for the public benefit, the sale will not be annulled, but the legitimate heirs will be left to their recourse against the universal legatee who received the price. C. C. 2604 to 2611.

Balot y Ripoll v. *Morina*, 552.

35. Though an heir who purchases property at a sale of the effects of the succession, is not obliged to pay the surplus of the price above the portion coming to him, until this portion is definitely fixed by partition (C. C. 1265,

2603); yet where interest from a certain time was stipulated as a part of the price of the property purchased, he will be bound to pay it; though from a period anterior to the partition of the property. *Per Curiam:* Were it otherwise, the condition of the heirs who purchase would be more favorable than that of the rest. *Marionneaux* v. *Marionneaux*, 666.

VII. *Of Heirs and Legatees.*

36. A succession cannot be accepted for minor heirs, but with the benefit of inventory; and no portion of the estate can come into their possession, until it has been administered upon in due course of law, when, whatever may remain after the payment of the debts, will fall under the administration of their tutor. C. C. 1051. *Arthur* v. *Cochran*, 41.

37. Article 1474 of the Civil Code, which declares that where the father disposes in favor of his natural children, of the portion, which the law permits him so to dispose of, he shall dispose of the rest of his property, in favor of his legitimate relations, unless he bequeath it to some public institution, does not constitute his legitimate relations, his forced heirs for the rest of his estate; nor does it render void the disposition in favor of his natural children, though he make no disposition of the residue of his estate, or subsequently dispose of it, in favor of persons not his legitimate relations; such subsequent dispositions are absolutely null, and the remainder will go to his legal heirs. If he make any disposition of such remainder, it must be in favor of some public institution, or of his legitimate relations, but, where there are no forced heirs, he may bequeath it to such of them, one or more, as he may select. *Compton* v. *Prescott*, 56.

38. A testator, without children or descendants, after several particular legacies, one of which was a legacy, under an universal title, of one-fourth of his whole property to his natural children, bequeathed all the remainder of the estate, which he then owned or might afterwards acquire, both real and personal, to four nieces, to be equally divided between them. The particular legacies, except one of a sum of money to another niece, either failed from the incapacity of the legatees, or were reduced. *Held*, that by leaving the remainder of his estate to be divided between his four nieces, the testator intended to give them only what might remain, after the payment of the previous particular legacies; that they are not universal legatees (C. C. 1599,) but legatees under a universal title (C. C. 1604); that not being bound by the will to discharge any of the particular legacies, they cannot benefit by their failure or reduction (C. C. 1697); and that the legacies which have failed or the amounts by which they have been reduced, must be considered as portions of the estate remaining undisposed of, devolving under article 1702, upon the legal heirs. *Ibid.*

39. Art. 1478 of the Civil Code, which, after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly

acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved. *Ibid.*

40. Illegitimate children of color, not the offspring of an incestuous or adulterous connection may prove their acknowledgment, by a white father, where such acknowledgment has been made by the latter, in a declaration before a notary public, in presence of two witnesses, not in the registry of the birth or baptism of such child; but no other proof of acknowledgment is admissible in favor of colored children, claiming descent from a white father. C. C. 221, 222, 226. *Ibid.*

41. Where the deceased has left no legitimate children or descendants, but a legitimate brother and sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *inter vivos*, or *mortis causa*, not more than one-fourth in value of his property. C. C. 1473. *Ibid.*

42. The undivided share of an heir in a succession may be seized and sold under execution (C. P. 647); but a creditor of an heir cannot seize and sell the right of his debtor to a part of the property inherited by him. The seizure must be of the whole of his rights in the succession, subject to the charges with which they may be burthened. *Mayo* v. *Stroud*, 105.

43. The renunciation, like the acceptance, of a succession, has effect from the opening of the succession. *Buard* v. *Lémée*, 242.

44. The removal of the husband and wife into another State, does not vest in either spouse any distinct or separate title to one undivided half of the community property previously acquired here. So long as the marriage continues, the husband retains his power over the property of the community; he has a right to enjoy its fruits; it is liable for his debts contracted after as well as before the change of domicil; and he may sell it, if the sale be not fraudulent. On the death of the wife, one-half of the property still in existence, acquired during the residence of the spouses here, will vest in the heirs of the wife, subject to the payment of the debts contracted by the husband during the marriage. *Succession of Packwood*, 334.

45. Real property inherited by one of the spouses during the marriage, and existing in kind at the time of its dissolution, should not be included in the settlement of the community between the survivor and the heirs of the deceased spouse; it must be withdrawn by the owner in the condition in which it existed at the dissolution of the marriage. If built upon, or improved during the marriage, the owner of the soil has a right to keep the improvements on accounting to the other spouse for one-half of the enhanced value of the property. C. C. 2377. He has no right to abandon the soil to the other spouse, nor to the community, and to claim in its place the amount of a previous valuation of it, thereby prejudicing the rights of others. *Mercier* v. *Canonge*, 385.

46. Where a slave, inherited by minors from the succession of their mother, has been illegally sold by their natural tutor, they will not be allowed to ratify the sale, and claim the price from their tutor to the prejudice of other creditors of the latter. Their recourse is against the purchaser for the recovery of the slave. *Ibid.*

47. An attorney appointed to represent the absent heirs of a succession, is incompetent to act as attorney in procuring the recognition of the heir. Such recognition must be sought contradictorily with him.

Succession of Mager, 413.

48. An appeal will lie in favor of the heirs from a judgment on an opposition made by them to a *tableau* of distribution presented by the curator of the succession of the deceased, though none of the claims so opposed and allowed against the estate exceed three hundred dollars, where their whole amount exceeds that sum.

State v. *Judge of Probates of New Orleans*, 415.

49. A testator leaving three or more children, or the descendants of three or more children, cannot dispose by donation *mortis causa* of more than one-third of his property. C. C. 1480. *Webb* v. *Goodby*, 539.

50. Grandchildren, forced heirs of the testator by representation of their mother, are bound to collate any legacy made to them by the testator, unless expressly made as an advantage over their co-heirs and besides their legitimate portion. C. C. 1306, 1307. *Ibid.*

51. Where a testator leaves no legitimate children nor descendants, but legitimate brothers or sisters, or descendants from them, an acknowledged natural child may receive from him, by donation *mortis causa*, one-fourth of his property. C. C. 1473. *Balot y Ripoll* v. *Morina*, 552.

52. Where by a donation *mortis causa* a testator disposes, in favor of an acknowledged natural child, of more than the law allows, the disposition is not null for the whole, but reducible to the *quantum* allowed by law. C. C. 1489. *Ibid.*

53. The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may be situated in this State, is not inconsistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress. *Succession of Mager*, 584.

See 10, 28, 32, 34, 35, *supra*.

SUMMARY PROCEEDINGS.

1. The act of December 21, 1814, imposing a penalty on any proprietor of a plantation, or agent of a proprietor, who shall neglect to keep on such plantation at least one white person for every thirty slaves working thereon, does not create an indictable offence. It contemplates not a criminal, but a civil proceeding, by motion of the district attorney, for the recovery of the fine. But where the district attorney proceeds by indictment, and, after a true bill found by the grand jury, and a conviction of the offender, makes a written motion, referring to the indictment and proceedings had thereon, making them a part of his motion, and prays for a judgment for the penalty, the motion for the recovery of the penalty will not be vitiated by the previous indictment and conviction; and, where the facts proved or admitted in the

record make out the case under the statute, the indictment, arraignment and trial will be disregarded as merely useless. *State* v. *Thomas*, 48.

2. Where accounts have been referred to auditors, the court may, on a motion to homologate the report, receive testimony and examine the auditors themselves, and correct any errors in the report, or order a new one, or a new examination of the accounts (C. P. 457); but it must proceed summarily. It cannot, without pronouncing on the report, submit the case to a jury. C. P. 457. *Flower* v. *Downs*, 101.

SURETY.

1. At the time of executing a prison-bounds bond by a debtor arrested under final process, the prison-limits were, under the statute of 25 February, 1837, coextensive with the boundary of the parish in which he resided. A new parish was afterwards formed from that portion of the old in which the debtor resided, and from part of a contiguous parish, and the seat of justice of the new parish established at a place never within the limits of the old. In an action against the surety on the bond, it was proved that the debtor had gone to the seat of justice of the new parish: *Held*, that the statute creating the new parish cannot have rendered the condition of the debtor more onerous by compelling him to remain within the restricted limits of the old parish; that, by the creation of the new parish, the debtor was either released altogether, or became a prisoner, in the custody of his bail, within the limits of the new parish; and consequently, that the bond was not forfeited. *Guion* v. *Ford*, 123.

2. Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Williams v. *Planters Bank*, 125.

3. An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the holder, their liability depends on the rules applicable to negotiable instruments in general. *Jacobs* v. *Williams*, 183.

4. Plaintiff who had obtained an attachment on giving a bond as required by law, represented that the attachment had not been served or levied according to law, and was therefore void, and prayed that another attachment might be issued, which was done, but no new bond was executed. The bond referred only to the first attachment. *Held*, that the liability of the surety in the bond related exclusively to the first attachment and bound him only for any damage resulting from it; that the bond could not be revived without his consent; and that the second attachment must be dismissed.

Erwin v. *Commercial and Railroad Bank*, 227.

TAX.

1. The act of 26 March, 1842, section 9, imposing an annual tax of two hundred and fifty dollars on money and exchange brokers, is not inconsistent with the constitution of the State, nor of the United States.

State v. *Nathan*, 339.

2. A tax collector cannot be required to receive in payment of taxes, *coupons*, or warrants for the semi-annual interest due on certain bonds of the State, executed in favor of a bank, though the State be bound to pay the interest on the bonds, where the party taxed does not show himself to be the owner of the bonds, and the *coupons* or warrants purport to have been issued, and to be payable by the bank, and the laws authorizing the issuing of the bonds in favor of the bank, give it no power to issue such *coupons* or warrants in the name of the State. *Roman* v. *Ory*, 517.

3. The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may be situated in this State, is not inconsistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress. *Succession of Mager*, 584.

TRIAL, SETTING CASES FOR.

Where an attorney is appointed to represent absent defendants, and on the same day an answer is filed by him and the suit dismissed, the proceedings are irregular, and, on motion by plaintiff, the suit must be reinstated. *Per Curiam:* As soon as an answer has been filed, the clerk must place the case on the docket, that it may be called in its turn and a day fixed for its trial (C. P. 463); and the court can order a nonsuit without the consent of the plaintiff, only where the case has been set for trial, and the plaintiff fails to appear, personally or by attorney, on the day fixed. *Ibid.* 536.

Walton v. *Commercial and Railroad Bank*, 99.

TUTOR.

See MINOR.

WARRANTY.

See SALE, 9.

WILL.

See DONATIONS MORTIS CAUSA.

END OF THE TWELFTH AND LAST VOLUME.

ERRATA.

Page 130, line 13 from bottom for 25 substitute 28.
" 176 " 6 " top " *Follien* " *Follain.*
" 227 lines 14 and 18 " " defendants " defendant.
" " line 19 " " " appellants " appellant.
" 243 " 20 " " " 285 " 2851.
" 258 " 3 from bottom for 4492 " 3492.
" 312 " 2 from top " G. " J.
" 334 " 4 " bottom " 2273 " 2373.
" 423 " 17 " top " *creditor* " *debtor.*
" 520 lines 4 and 3 from bottom *dele* " *with whom it is alleged that the note was deposited as collateral security.*"
" 522 line 16 from bottom for 33 substitute 24.
" 530 " 13 " top " 3148 " 3184.
" 564 at top, in the numbering of the pages for 468 substitute 564.
" 621 line 12 from bottom for 366 substitute 346.